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CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

CONFIRMATION OF APPOINTMENTS TO THE FEDERAL JUDICIARY AND THE DEPARTMENT OF JUSTICE

MARCH 11; APRIL 1, 7, 28; MAY 13, 20, 28; JUNE 3, AND 18, 1987

PART 1

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WEDNESDAY, MARCH 11, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met at 2:11 p.m., pursuant to notice, in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy (acting chairman) presiding.

Also present: Senators Simon, Thurmond, and Humphrey.

Staff present: Steven J. Metalitz, special counsel; Robert Short, minority chief investigator; Stephanie Hamlett, nominations clerk.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The Senate Judiciary Committee will come to order.

I apologize for being a couple of minutes late. I had a phone call from New Jersey that held me up.

Without objection, I will submit my opening statement for the record.

[Statement follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

This afternoon the Judiciary Committee holds its first hearing of the 100th Congress on nominations to the federal courts.

The role of the Judiciary Committee, and of the full Senate, in the advice and consent process is one of our most important constitutional responsibilities. It is particularly crucial in the case of nominations of federal judges. The men and women whose nominations we approve this year will be granted a lifetime charter to resolve the legal disputes and to safeguard the constitutional rights of the American people. Their decisions will affect the lives, liberty and property of our citizens well into the 21st century. The Senate must be satisfied that every nominee meets stringent standards of integrity, competence, fairness and temperament. And, for the most part, the Senate must make that judgment based on the record that we make here this afternoon, and in subsequent hearings.

Accordingly, it would be a serious mistake to treat any judicial nomination as routine. The qualifications of all nominees must be carefully investigated, and issues affecting their qualifications must be thoroughly examined in public hearings. This afternoon we begin that process. The American people have a right to expect that our consideration of the President's nominees to the federal bench will be tough but fair, that our scrutiny will be rigorous but responsible. Our commitment to fulfill that responsibility to the American people, and to the Constitution, begins this afternoon.

Today, we will hear from four nominees. They are Judge Edward Leavy, a nominee for the Ninth Circuit Court of Appeals; Mr. Malcolm Marsh, a nominee for the District Court in Oregon; Judge Morton Greenberg, a nominee for the Third Circuit

Court of Appeals; and Mr. James Zagel, a nominee for the District Court in Northern Illinois. Each nominee has completed a detailed questionnaire developed by the Judiciary Committee. Their responses provide a wealth of information about their professioinal qualifications and experience. Without objection, the publicly available portion of the nominees' responses to the questionnaire will be included in the hearing record.

Before we turn to the nominees, I have the pleasure of welcoming to the Committee four Senators who have asked to make brief introductory remarks. Senators Hatfield and Packwood will introduce nominees Leavy and Marsh, and Senators Bradley and Lautenberg will introduce nominee Greenberg to the Committee. I understand that Senator Simon will be here shortly to introduce nominee Zagel.

Senator **LEAHY**. I understand, Senator Bradley, that you have another committee I ask you and Senator Lautenberg to come to the table. You have a statement to make and I know Senator Packwood and Senator Hatfield do, too.

What I would suggest, if there is no objection from my distinguished colleague from South Carolina, is that we might call on each of the Senators to speak first and then we will go on with the regular hearing.

Senator **THURMOND**. Yes, I would like to make an opening statement and that would be fine.

Senator **LEAHY**. If you would like to, go right ahead.

Senator **THURMOND**. I have got to go down the Labor Committee to introduce a South Carolinian, the head of the South Carolina Educational Television—and we have the best system in the Nation, people come there from all over the country to learn about it—and I have got to introduce him so that he can tell the rest of the Nation how to do it.

Senator **LEAHY**. Does that mean I have to talk about Vermont ETV now? [Laughter.]

Senator **THURMOND**. So I just want to say these nominees and the Senators who are here, Senator Bradley—I see both New Jersey Senators and Senator Lautenberg, we are glad to have you here, too, as well as—the Oregon Senators, Senator Packwood and Senator Hatfield, and I have looked into these nominations and they are all well qualified and I will be glad to support all of them.

I have a few questions you can answer for the record here that Mr. Short will present to you.

Now, Mr. Chairman, I want to make this statement: It is a pleasure to welcome each of the nominees to the Committee. I am very pleased that we are finally beginning hearings today on judicial nominations.

We received the first judicial nomination on January 20, and that is almost two months ago, and now 35 total nominations are pending before the Judiciary Committee. I have been informed by the Department of Justice that there are currently 73 vacancies within the federal judiciary alone and that there are approximately 70 non-judicial vacancies existing at this time.

I know the Chairman shares my concern that each nominee receive a full and fair hearing, and I am confident that will occur. However, I would urge the Committee to move as expeditiously as possible to complete its inquiry on all nominations. The Federal judiciary suffers when judges who are needed to hear cases are held up by this committee.

Once again, I am pleased we are having this hearing today. I commend Senator Leahy for taking on one of the major responsibilities in the U.S. Senate. I offer my full cooperation and will do all within my power to assist in this extremely important task.

Now, Mr. Chairman, if you will excuse me, I need to go to the Labor Committee. As I said, they have all been investigated, they are all all right, so just approve them and send them right out.

Senator **Leahy**. I remember, though, in that your statement in which you are saying how good these nominees are, you are also mentioning that your educational television is better than ours, so that is why I worry.

Senator **Thurmond**. Well, why do the Vermont people come to South Carolina to learn how it is done?

Senator **Leahy**. I learned long ago to never try to get the last word. [Laughter.]

Thank you, Senator Thurmond.

Senator Bradley?

STATEMENT OF HON. BILL BRADLEY, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Bradley**. Thank you very much, Mr. Chairman, and I hope that the call to New Jersey was productive.

Mr. Chairman, I am pleased to be here today to introduce Judge Morton Greenberg, who has been nominated by the President to fill a vacancy in the Third Circuit Court of Appeals.

Judge Greenberg is currently a Superior Court Judge in the State of New Jersey. He brings extensive legal experience to the Third Circuit. He has been a member of the bar for thirty years. During that time, he has gained experience on both sides of the bench.

As a litigator, Judge Greenberg was in private practice for many years and later served the people of New Jersey in the New Jersey Attorney General's Office as the Assistant Attorney General.

As a judge, he has served on the Superior Court of New Jersey since 1973. Judge Greenberg has been reappointed to the bench by two Governors of different political parties and has been elevated by successive Chief Justices to increasingly important positions.

Since 1980, he has been assigned to the Appellate Division where he currently serves as Presiding Judge on Part F of that court. Judge Greenberg has a rich and varied background of judicial experience, having presided as both a trial and appellate judge.

During his years on the court, he has published over 131 decisions. The Judge has heard a myriad of cases on constitutional issues, ranging from a commerce clause case, concerning the trucking industry to a due process question arising from a criminal entrapment case, to a challenge on the constitutionality of a debt limitation clause in the State Constitution.

Today, the Third Circuit Court of Appeals faces an impending crisis. With four vacancies on the Court, the current backlog of three months will soon grow to a six-month backlog. It is imperative that these vacancies be filled as soon as possible in order to avoid a crisis of judicial delay in the Third Circuit that could take years to remedy.

How fortunate we are at this time to have a man of Judge Greenberg's caliber and enthusiasm available to fill one of these vacancies. I am sure Judge Greenberg will bring to the Third Circuit Court of Appeals the same sense of fairness and justice he has exercised consistently for over a decade in the courts of New Jersey.

Mr. Chairman, it is a great pleasure for me—and I know that Senator Lautenberg will also speak—it is a pleasure for me and for both of us to be here to introduce Judge Greenberg to the committee and to recommend his approval. Thank you.

Senator **Leahy**. Thank you very much, Senator Bradley.

Senator Lautenberg?

STATEMENT OF HON. FRANK F. LAUTENBERG, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator **Lautenberg**. Thank you, Mr. Chairman.

I am pleased to be here with my colleague, Senator Bradley, to commend to you Judge Morton I. Greenberg and to express my support of his nomination to the U.S. Court of Appeals for the Third Circuit.

Justice Greenberg has served as a respected and distinguished member of the New Jersey State Judiciary since 1973. As Senator Bradley noted, he was originally appointed by a Republican Governor and reappointed by a Democratic Governor.

He began his service as a member of the Law Division of the Superior Court and quickly was promoted to serve in the Chancery Division. He later served as an assignment judge, which carried with it important administrative duties and was elevated to the Appellate Division in 1980.

In his years on the bench, Judge Greenberg has amassed a great body of written opinions, he has developed a reputation as a judge who is scholarly, yet practical, fair, and yet logical.

Before becoming a judge, Judge Greenberg served as a private attorney, Deputy Attorney General and an Assistant Attorney General. He tried cases in the Federal and State courts and he fulfilled his obligation as a member of the bar to provide service to those who could not otherwise afford it.

Mr. Chairman, his nomination is not a victory for conservatives and it is not a victory for liberals. It is a victory for merit. He is a person who has lived a life of service to the law. He has distinguished himself. He has resisted the option that I am sure has been available to him, to go to a lucrative private practice and yet he continues to serve the public and the law and he brings credit to himself and our State's judicial system.

That kind of commitment and that kind of service should be rewarded, and for Judge Greenberg's sake it should be rewarded for the sake of others, to send a signal that such commitment has its rewards.

I am pleased to introduce, along with Senator Bradley, Justice Morton Greenberg to the Committee and to urge the Committee's favorable consideration of this nomination.

Thank you.

Senator **Leahy**. Thank you very much.

Judge Greenberg, I am sure you realize that when two Senators who are as well respected as Senator Bradley and Senator Lautenberg, come and put their own considerable reputation on the line, that carries a great deal of weight here, too. I know both Senators are committed elsewhere. You are both free to go. I thank you both very much for taking the time to come over.

Judge Greenberg, if you would step down for just a moment, so we can now hear from Senator Packwood.

Bob, I know you are here with Edward Leavy, Malcolm Marsh, and Senator Hatfield is as well.

Senator Hatfield, we will start with you, sir. I would have mentioned you earlier. I did not see you sitting back there. I saw Senator Packwood over here.

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator HATFIELD. Mr. Chairman, I would like to thank the Committee for scheduling this hearing in a very timely fashion.

I believe we have two candidates here today who are befitting the first hearing of the 100th Congress.

First, I would like to make a brief introduction of the gentleman to my right, Judge Ed Leavy. Judge Leavy is an Oregonian who did his undergraduate work at the University of Portland and received his law degree from Notre Dame.

He returned to Oregon where, after a brief period of private practice, he assumed a position of great trust and importance in the Lane County District Attorney's Office, where he served there as a Deputy. He then was appointed to the District Court of the State system, and from there he served on the State Circuit Court. He served pro tem on the Oregon Supreme Court and had a responsibility later as a U.S. Magistrate for the District of Oregon.

About three years ago, he appeared before this Committee as a nominee for the Federal District Court. He had no difficulty in passing the approval of this Committee and was consequently confirmed by the Senate. He has served with distinction on the Federal District Court at Portland since that time.

Judge Leavy now comes before you to be considered for an appointment to the U.S. Court of Appeals for the Ninth Circuit, and thereby that vacancy is to be filled, hopefully, by the candidate to our left, Mr. Malcolm Marsh, of Salem.

Mr. Marsh is a University of Oregon graduate, both the undergraduate school and the law school. He has been practicing law for about thirty-two years in a very outstanding firm in Salem and is considered one of the finest litigators in the State.

He has a wide range of practice in representing business groups and insurance companies, in environmental cases, consumer protection cases, and product liability cases as well as a variety of other legal matters.

Mr. Marsh is also a very active person in the community. He has served as a member of the Salem Chamber of Commerce, has been very active as a trustee and director of enterprises of various kinds, and has been supportive of the Boy Scouts. Mr. Marsh is clearly one of the leading citizens, as well as one of the leading practitioners of the law, in the capital city of Oregon.

I have known both of these gentlemen for many years both personally and professionally, and it is a great privilege to present these nominees who I think represent two of the finest lawyers and practitioners of our State, as well as two of the State's outstanding citizens. By temperament, by experience and by demonstrated record, I think you will find these are two gentlemen who are most qualified to serve on the Federal District and the Federal Circuit Court of Appeals.

Thank you.

Senator LEAHY. Thank you very much.

I should say, Judge Leavy and Mr. Marsh, I have served for 10 years now as a member of the Appropriations Committee with Senator Hatfield and he is a close friend and one of the Senators I have the greatest respect for. Today's nominees seem to come with all my friends lined up. I do not know whether this is coincidence or just the ones we have here.

I see another close friend, Bob Packwood, who is probably not going to contradict Senator Hatfield in this regard.

Bob, I will turn it over to you.

STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. I learned, Mr. Chairman, long ago not to contradict Senator Hatfield. He was my teacher in college. And so whether or not I was here at the counsel table with him, I would not contradict him under any circumstances.

Senator LEAHY. I did not go to college out there, but that is what they told me when I came here, too: do not contradict Mark Hatfield. Go ahead. [Laughter.]

Senator PACKWOOD. Every time Senator Hatfield and I come before the Judiciary Committee, I feel a great degree of pride in the nominees that we have to offer for any of the judicial positions that we have offered people before, but the two today are really extraordinary by any measure.

Senator Hatfield has detailed their careers. Ed Leavy was first appointed to the bench thirty years ago this year. He has served on the State District Court, the State Circuit Court, the Federal District Court, he has been a Federal Magistrate. Now he has been nominated for the Federal Court of Appeals.

Mr. Chairman, you are not going to find a man or a woman with more extraordinary ability and longevity at still a relatively young age. In the brief period of time when he was a Magistrate, after serving on the Circuit Court in Oregon and before he was appointed to the United States District Court, it was commonly said—and I think I can say this even without fear of contradiction from our other Oregon District Judges who are in the room behind us—that he was often regarded as one of the best District Judges when he was a Magistrate.

So from the standpoint of someone with judicial background, we get it with Ed Leavy.

Malcolm Marsh, if you were to take a poll of the entire Oregon bar and ask, "Who are the five best litigators in the State?" Malcolm would be on that list without question. He is held in the highest regard by his peers. People say: if you are going to put someone on the bench, please put somebody on the bench—and they mean the Federal District Court bench—who has tried a case, and who understands the presentation of evidence. We could not find a better person in the entire State of Oregon than Malcolm Marsh.

Their private records are impeccable, their public records are without peer, and I am delighted to join Mark Hatfield in recommending both of these men for appointment today.

Thank you, Mr. Chairman.

Senator **Leahy**. I thank you very much.

I would propose that we start the hearings with Judge Leavy, but I also know that in the normal course of Senate life, both Senator Hatfield and Senator Packwood have about three other committee meetings going on at this time, and if you wish to leave, that is perfectly all right. You are welcome to stay, but you probably could not improve on what you have already said.

Senator **Packwood**. Thank you, Mr. Chairman.

Senator **Hatfield**. Thank you, Mr. Chairman. I think we left the most important point off of our presentations, and for that I apologize for myself on behalf of Senator Packwood as well, in not calling the Chair's attention to the fact that both Mrs. Leavy and Mrs. Marsh are here and I would like to have them stand.

Senator **Leahy**. Would you ladies please stand.

Thank you for coming here.

Senator **Hatfield**. Thank you. Also he has several members of his family present besides his wife Eileen. I would like to introduce his daughter Mary Kay Brown, sons Patrick and Paul, sister-in-law Mary Hagenauer, niece Judy Harword, nephew Lt. Col. Larry Hagenauer, along with Beth and Shelby Hagenauer, and friend Glenn Hutchenson.

Senator **Leahy**. In a while Senator Simon will be here to introduce James Zagel, so in the meantime we will start with Judge Leavy.

I might note, though, just for the record, as Senator Thurmond did, that this is the first hearing in the 100th Congress on nominations to the Federal courts. For any of the judicial nominees who have a bit of a sense of history, it is a footnote in history but it is something to keep in mind. But it is also important because the Judiciary Committee, as all of us with a sense of history know, has a very, very significant role in this area, as does the whole Senate in the advice and consent process. It is really one of the most important constitutional responsibilities any Senator has. His or her vote takes on an added meaning and an added importance, which is especially crucial in the nomination of Federal judges.

These are men and women whose nominations, as we approve them, give them a lifetime charter, a charter to resolve legal disputes and to safeguard the constitutional rights of the American people. Many of us in this country think of the federal courts as the last bastion of freedom. If freedoms are questioned, if rights are in jeopardy, the federal court is the one place that people go where they expect not only extraordinarily competent but extraordinarily fair disposition of their disputes. The decisions of judges confirmed this year will affect the lives and liberty and property of our citizens well into the 21st Century.

So I think the Senate—and this should be the feeling of every single Senator—has to be satisfied that every nominee meet stringent standards of integrity and competence, fairness and temperament. And for the most part, the Senate is going to make that judgment based on the record we have here this afternoon and at all our subsequent hearings, so we are not treating any judicial nomination as routine.

In fact, I cannot accept that term. I do not think any judicial nomination can be considered routine. The qualifications of all nominees are going to be carefully investigated. Issues affecting their qualifications will be thoroughly examined in public hearings, just as we are doing this afternoon. The American people have a right to expect that our consideration of the President's nominees to the Federal bench will be tough, but fair, that our scrutiny will be rigorous but responsible, and, as I said, our commitment to fulfill that responsibility will begin this afternoon.

Now, I would begin with Judge Leavy. Sir, if you would like to make any opening statement, feel free.

TESTIMONY OF HON. EDWARD LEAVY, A NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT, OREGON

Judge **Leavy**. I am just delighted to be here, Mr. Chairman, and I consider it an enormous privilege to serve as a Judge in the United States Court. It is almost an overpowering thing. Just the experience of going through this process of being selected, this very process is one which I cannot express how strongly I feel about.

Senator **Leahy**. Judge, I was just reminded that we do customarily swear all witnesses.

Do you solemnly swear that the testimony that you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Leavy**. I do.

Senator **Leahy**. Judge, I understand that you have been very involved and have been successful in the role as a settlement judge in the District Court, that you have been brought in to help settle some State cases as well as cases before the Federal courts. Tell me, what does a settlement judge do?

Judge **Leavy**. Well, we have an understanding among all of us in the District that any time a case is assigned to one of us for trial, the others have been available to serve as a so-called settlement judge, and it means that if the parties will somehow let us know that they want to sit down with the help of a judge and try to negotiate their differences, that up until recently we will make a judge of the court available, either a judge or a magistrate available to sit down with the parties and go through that process.

I have had the experience of having done that in literally hundreds of cases, particularly while I was a magistrate. Our success, however, has just about robbed all our time and now we have expanded it, to ask that members of the bar who are willing to act in a conciliation capacity, to let that fact be known to the court and any party then who wants to sit down with a fellow lawyer in the community who may have expertise in a certain field, those lawyers are available at no charge to serve in that role, with the expectation that if they help parties resolve somebody else's case, they may in turn call on someone to do that.

Now, on occasion, parties with litigation in the State courts will seek one or the other of us in the District Court to sit down, and I have done that on occasion, either on call from a State judge or with the consent of all of the attorneys in a case that is rather complicated and expensive in the State system.

Senator **LEAHY**. How many District Judges are there in Oregon?

Judge **LEAVY**. We have five positions and we have one senior and we have three magistrates.

Senator **LEAHY**. And you find that there is just a constant call for this kind of a settlement judge?

Judge **LEAVY**. Yes, indeed, there is. And I could just brag about our success a little bit, one of our senior judges took on 125 asbestos cases for the District of Hawaii and he began those with an allotted time of about five weeks or six weeks to try to handle or make his way through 125 cases.

Our Chief Judge from Oregon, Judge Panner, worked to settle those cases, and at the end of two months they had disposed by trial of three of those cases and the remainder were settled. It is something that the parties are eager for in this day of expensive litigation, and the key to it is to try to be available along the lines before too much expensive discovery has been done.

Senator **LEAHY**. I am sure that is extremely important, that you have credibility in it, otherwise nobody will choose this option. It is the option of the parties, both parties must agree to go to a settlement judge.

Judge **LEAVY**. I think we make it clear that it is not a ritual that anybody has to go through in order to get himself into the courtroom. I think that would be unfair if we were to require it as some sort form of ritual, without the desire of the parties, it would be counterproductive.

Senator **LEAHY**. You have been nominated to the Circuit Court of Appeals. Again, from my own days of practicing before the Circuit Court, I recall the amount of time it takes before we would even get on the docket. Then, of course, there is the extensive work that goes into preparing the brief, the time and expense of obtaining a transcript and so on and then to wait for the decision. What about settlement judges at the Court of Appeals level? Is that possible or are you dealing in entirely different dynamics? I am just thinking about the backlog in a lot of the Courts of Appeals, they are pretty extensive.

Judge **LEAVY**. Well, I think the potential is more limited at the appellate court level than it is at the trial level, although there again we have had some experience with that. A case comes to mind in which an appellate judge of our Ninth Circuit sat down with parties in a case that I had tried, and the verdict was some $9 million and the parties were desirous of settling that on appeal and sat down with our Judge Skopil and they did work out a settlement and that is always welcome news to a trial judge.

Senator **Leahy**. You were a Justice pro tem of the Oregon Supreme Court for a few months, and you served periodically by designation in the Court of Appeals. But how do you feel about somebody whose experience has been predominantly in trial work to go onto the Court of Appeals?

Judge **Leavy**. Well, I think there is a place for a former trial judge on the Court of Appeals, as there is a place for people with academic backgrounds. I can sense a need on the appellate court to make sure that they are, when they are finished, letting the District Courts know precisely what is expected in the event they are not affirmed by way of what is left to be done, and the appellate court has, of course, that enormous responsibility of trying to allow lawyers to advise their clients on what to expect based upon what they are saying, and I am very mindful of that from the perspective of the trial judge in trying to be sure that—and hopefully what-ever I will do if I am confirmed here will make it clear to lawyers and trial judges what we expect.

Senator **Leahy**. I did a great deal of appellate work. I was always pleased with those appellate judges who had a fair amount of trial experience before becoming appellate judges. I just thought they got into the cases a lot better. I also found that they were the ones that tended to look into the transcript with a more searching eye.

Incidentally, this is a question that has nothing to do whatsoever with your confirmation, but is a matter of curiosity. What basic qualities make a good trial judge, in your estimation? I mean we have to ask ourselves that question a hundred times a year of nominees. Just in your own gut, what do you think makes a good trial judge?

Judge **Leavy**. Well, as Senator Hatfield mentioned, I ran for office. I ran in 1960 against an incumbent Circuit Judge. I was a District Judge, and I did not how to do it except to knock on doors, and I knocked on 3,000 doors and I had been a traffic court judge in that community for four years before I started that. I learned as much on the doorstep about being a judge as I learned any place else, and that is that if a trial judge will listen a litigant would even forgive him for being wrong. But if a trial judge does not listen, there is no way that the parties would even respect him for being right.

Then you have to be a believer in the adversary system and decide the issues that are presented and not try to present a case that the parties are not interested in, and sometimes it is difficult to know what kind of a judge a person will make because you just have to believe in letting people do their job and you do yours, and I think that is the key to being in the courtroom, let the lawyers have an enormous responsibility, and good lawyers, as you know, make for good trials and if we allow them to function and rule on what is presented, instead of trying to shape that litigation in some fashion to the case we want to hear, we are much better off.

Now, I do not know if that simple answer makes for a good response——

Senator **Leahy**. It is a good answer. I could think of a number of judges I have tried cases before that fit in that category and I can think of some that did not. I enjoyed the ones that fit that definition you have given.

We also have a couple of standard questions for each nominee. Have you ever been a member of any club or other organization that discriminates in membership policies or practices on the basis of race, gender, or religion?

Judge LEAVY. No, except to the extent that I am active in a church and I was in the Knights of Columbus but they are by definition aimed at a specific religion but not otherwise.

Senator LEAHY. Judge, I thank you very much. Of course, the record is open if any other Senators have questions.

Does Senator Thurmond have any?

Mr. SHORT. Senator Thurmond has some questions that he would like to submit for the record.

Senator LEAHY. Fine. Senator Thurmond will be submitting some questions for the record.

I thank you very much.

Judge LEAVY. And do I understand that they are to be answered in writing.

Senator LEAHY. Yes.

Judge LEAVY. All right. Thank you.

[The questions of Senator Thurmond follow:]

QUESTIONS FOR JUDGE EDWARD LEAVY, OF OREGON, TO BE UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT.

Question:

1. Judge Leavy, would you tell the committee what you feel will be the most rewarding aspect of serving as a Circuit Court judge?

ANSWER:

I hope to contribute in some way to the simplification of the law. On balance I think it is cruel to provide remedies that are so complex that they fail to accomplish the intended goal of the law makers. I also hope to add to the Circuit Court's awareness of the problems of the lower courts and parties in following the mandates of the Court of Appeals.

Question:

2. Judge Leavy, as an appellate judge you will be reviewing decisions of District Court judges. What criteria do you intend to use in reviewing these decision and trial records?

ANSWER:

In most cases the criteria is set by law, depending upon the issue to be decided. On balance, I will look for ways to end litigation rather than for ways to substitute my judgment for that of the trial court or administrative body.

Edward Leavy
March 11, 1987

Senator **Leahy**. Thank you very much, Judge.

If we could have Malcolm Marsh join us. Mr. Marsh, would you please stand.

Do you swear that the testimony you will give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Marsh**. I do.

TESTIMONY OF MALCOLM F. MARSH, OF OREGON, A NOMINEE TO BE A U.S. DISTRICT JUDGE FOR THE DISTRICT OF OREGON

Senator **Leahy**. Mr. Marsh, do you have anything you wish to say before we begin the questioning here this afternoon?

Mr. **Marsh**. I do join Judge Leavy in saying that it is truly an honor to be here. This is a very interesting process and one which has been challenging throughout. I realize from it the enormous responsibility that the Federal District Judge has by just the attention that has been placed upon this process. So it is an honor to be here with you, Mr. Chairman.

Senator **Leahy**. Thank you.

Mr. Marsh, you have had a pretty extensive practice in the area of legal malpractice and products liability, but that has been predominantly on the defense side, has it not?

Mr. **Marsh**. That is correct.

Senator **Leahy**. Your nomination has been broadly endorsed. One of the things which I looked for first is how the plaintiffs' bar felt. They have been very kind and generous in their comments about you.

In your practice, you have had to be very much a defense advocate to be successful. Do you see any difficulty in moving from that role, an advocate predominantly for one side of the issue, to become one who does, as Judge Leavy suggested, let the lawyers try the case, listen to them and keep within the case presented? In other words, going from being an advocate to being a judge.

Mr. **Marsh**. I think that it is a difficulty but more of a challenge. I think that in the years of experience on the trial side, part of my success has been in the fact that I have always been able, and I always felt it was my duty and responsibility to not only be an advocate for the side I represented, but also to be courteous, fair and concerned with the problems and contentions of the plaintiff side.

So I think I have been successful in the settlement or resolution of cases as well as the trial. I have a great many personal friends who are of the plaintiffs bar, and so I look upon it not so much as whether I was a plaintiff or defense attorney, but more upon facing the new responsibility and challenge.

That experience has not only placed me in close proximity to many plaintiffs attorneys but also many trial judges, and so I have been able to see those judges which I can use as role models. And when I see the ones that are described as Judge Leavy has described them—and he is one of those—then I see that humility, the compassion, the absolute patience and ability to listen which are foremost in that responsibility.

These are challenges, these I do not take lightly. I think that I am prepared to do them and so I am satisfied that, although it is difficult and challenging, it is something that I look forward to.

Senator LEAHY. The reason I asked the question—and I would ask the same, of course, if you were predominantly identified with the plaintiffs bar—those of us who try cases know that there are some judges who are sometimes thought of as a plaintiff's judge and some who are thought of as a defendant's judge. I have always much preferred, no matter which side I was on, trying cases before judges who do not get the identification of being either plaintiff or defendant judges.

Are you satisfied in your own mind that you can keep from being pegged as one or the other?

Mr. MARSH. I am confident of that, sir.

Senator LEAHY. Now, you have had very little to do with criminal litigation. I am told that about a seventh of the cases in the District Court in Oregon would normally be expected to be criminal cases. That has not been your general area of expertise. Do you see any difficulties there?

Mr. MARSH. No. The first twenty years of my practice did involve extensive criminal law up to major felonies and homicide cases. The last number of cases that I was connected with in criminal law were all homicide cases or kidnap cases. I have not been involved in the criminal law since about 1975, but I do not have anxiousness about the trial procedure in criminal law, nor do I feel that it will be difficult to pick up the rules that are particular to criminal law.

I think that is an area in which I will probably spend most of my time in preparation in the event that you see fit to confirm my position. This is where I will spend a good deal of my time in studying prior to actually taking the bench.

Senator LEAHY. You have had some very complex tort cases that you have handled. Generally, how do you see the role of the Federal District Court in complex cases? Is it set up to handle highly complex court cases, or are we in a situation that the only way to get those handled is to try to figure out ways to settle them?

Mr. MARSH. My experience there, except for minor instances, is all with the Oregon District Court and they are particularly well set up. I was involved in the beginning, before the facility was created, in all of the asbestos cases that were filed in Oregon, and part of the success—if we can use that word in handling those cases—was the fact that both the plaintiffs attorneys and the defense attorneys all worked well with the District Court in setting up procedures and systems for handling those cases that worked.

I think that it is necessary that you do have the cooperation between both the bench and the bar in order to make those systems work. I think that also everybody's eye is on alternative resolution procedures and in effect you really adopt them when you adopt some kind of a different or unusual case management system. The District Court in Oregon is very open to ideas in that respect.

Senator LEAHY. You said in the Committee's question on judicial activism, in an area where you touched on the kind of relief that should be available when a constitutional violation that has been proven, you wrote:

> The court should be quick to apply those remedies which exist under the law, but the court should not be charged with nor assume the means of assuring humane conditions nor setting the lifestyles of persons subjected to discriminatory practices. Court supervised policing of the problem, while understandable in light of the pressure to do so, should be avoided under the doctrine of the separation of powers.

Now, the fact is under exceptional circumstances Federal courts do retain jurisdiction over the offending institution. This has happened in some of our prison systems around the country. Sometimes they have even had to assert more direct control over the operations in order to assure compliance with the Constitution, and sometimes continuing supervision is about the only way that can be done.

Can you assure us that you will make available all the remedies and established precedents in order to vindicate constitutional rights in those cases that are before you?

Mr. **Marsh**. Absolutely, Mr. Chairman. I feel very strongly regarding those particular problems. The court is one of the areas that needs to face those problems, and in Oregon the District Court has faced the problem of overcrowding in the Oregon State penitentiary system and I know that that State system is at a critical point.

I do not think it is inappropriate, what the Court has done there in setting limitations on the numbers. My concern though is that the courts do realize that their position is as one of the three branches, that the Legislative Branch is also a branch that should be just as concerned with those same constitutional rights and the administrative branch as well.

So my answer to that particular question is based on the fact that I have the greatest respect for the other two branches of government and that I do not intend to move into those areas to the point that it actually hinders or obstructs their own actions.

Senator **Leahy**. Have you ever been a member of any club or other organization that discriminates in membership policies or practices on the basis of race, gender or religion?

Mr. **Marsh**. For a few years, when I first started practicing law, I was a member of the Elks Club. I determined——

Senator **Leahy**. The which?

Mr. **Marsh**. The Elks Club. I determined at some point that that club did discriminate and I resigned immediately. There was no particular instance in the club I belonged to nor in Oregon that I know of, but I understood that from a national standpoint and upon finding that out I immediately resigned from that club.

Senator **Leahy**. And none other?

Mr. **Marsh**. No others.

Senator **Leahy**. We thank you very much and we thank Mrs. Marsh for coming here, too. I am sorry that the weather is a little bit chillier than it is normally this time of year in Washington. I do not know when you got in town, but——

Mr. **Marsh**. We got in last night, sir.

Senator **Leahy**. One of my youngsters was here for the weekend and I was up in Vermont, and he said it was beautiful here over the weekend. But that is like saying you should have been here yesterday when the fish were really biting.

Thank you very much.

Mr. Marsh. Thank you, Mr. Chairman.

[Response to questions follow:]

QUESTIONS FOR MALCOLM F. MARSH, OF OREGON, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF OREGON.

Question

1. Mr. Marsh, your litigation experience has been extensively civil in nature. Would you tell the Committee what steps, if any, you have taken to prepare yourself for the criminal caseload that awaits you at the federal district court?

Answer

The first 20 years of my practice included extensive criminal law both on a retained and appointed basis. I do not anticipate that it will be difficult to refresh my ability in that field. However, I have instituted a program of refreshment through the information available from the Justice Center and will augment that information through the observation of criminal trials that will be tried in the District in the coming weeks. I shall also pay particular attention to the rules unique to criminal procedure.

Question

2. Mr. Marsh, Thomas Jefferson remarked shortly after the ratification of the Constitution that "Our nation's particular security is the possession of a written constitution. Let us not make it a blank paper by construction." Mr. Marsh, what do you think he meant by that warning: "Let us not make it a blank paper by construction"?

Answer

I believe Thomas Jefferson was concerned that the Constitution could be rendered ineffective by an unrestrained administration, a reactive legislative branch or a judiciary bent on rewriting the Constitution by personal amendment. The Constitution itself provides for its amendment. It includes a built-in safety system that prevents abuse. The Constitution has historically demonstrated its ability to keep pace with social changes. The common law is a necessary element of that flexibility which prevents any single court or other body from being able to accomplish a change on an individual basis. The courts should be the first line of defense to see that the system of checks and balances is maintained to preserve the Constitution.

Malcolm F. Marsh
March 11, 1987

Senator **Leahy**. I wonder if Judge Greenberg could join us back at the table.

Judge Leavy and Mr. Marsh, you and your families do not have to stay at all. You are welcome to stay and see what a rough time we give Judge Greenberg, but you do not have to otherwise.

Judge, would you raise your right hand. Do you solemnly swear that the testimony you will give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Greenberg**. I do.

Senator **Leahy**. Thank you.

Judge Greenberg, after all the nice things that Bill Bradley and Frank Lautenberg said about you, do you want to add anything else or do you want to disagree with what they had to say?

TESTIMONY OF HON. MORTON I. GREENBERG, OF NEW JERSEY, A NOMINEE TO BE U.S. COURT OF APPEALS JUDGE, THIRD CIRCUIT, NEW JERSEY

Judge **Greenberg**. I can just say this, Mr. Chairman: I heard what the other nominees said and it is a great honor to be here today. I frankly never in my life ever expected to be here in a situation like this and I can just thank the persons responsible and the Committee for taking its time to go over it.

I will say this, that I have been a judge for many years. I have done my best and if this Committee sees fit to release my name and I am confirmed, all I can pledge to the Chairman and the rest of the Committee is that I will just do in the future what I have done in the past. That is all I can say.

Senator **Leahy**. Judge Greenberg, I must say that I was not in any way just practicing normal senatorial courtesy when I spoke of Frank Lautenberg and Bill Bradley or Mark Hatfield and Bob Packwood. These are four of the most respected members of the Senate, and having them start off these hearings the way they did means a lot.

But I suspect that in your case, the statements on your behalf were so strong because the record is pretty substantial. In seven years on the Appellate Division of the New Jersey Superior Court, you have rendered more than 1,200 opinions. Only 9 were reversed by the State Supreme Court, only 5 more reversed in part. That is a batting average that is going to put you top up in the fraction of one percent of judges around the country.

I found it remarkable, that in all those years you filed only two dissenting opinions, and one of these was in a case which the State Supreme Court reversed, in effect vindicating that dissent. How do you get these other judges of the appellate court to see things so much your way? This is remarkable.

Judge **Greenberg**. Mr. Chairman, that does not necessarily mean that they see it my way. What it means it this: If you come in and you are a judge and you are not standing off on a hard ideological position on cases, then you sit down and you iron out the case and you work out an opinion and you come to a consensus and you work it out and you come to a reasonable consensus in the case, and sometimes it is not what you would necessarily do but you feel, well, this is reasonable you also say that you do not know everything, and your two colleagues think you are wrong, then it is time to look at yourself again, and that is why there are only two dissenting dissents in all those years. As a matter of fact, I think I must have been in 2,500 opinions.

Those two I went over and over and over and I just thought that they were wrong. But you can always see something in the other person's view and that is the reason. I will say many times I convinced my colleagues, but not always.

Senator **Leahy**. Every Senator has to bring his or her own experience to make a decision on what to do on a nomination. In my case, as one who practiced law and then spent a fair amount of time as a prosecutor, I know one of the things that used to drive me up the wall was getting opinions back from an appellate court with about three other opinions with it, whether they are dissenting opinions or whether they are adjuncts of the majority opinion or whatever, and never really being sure just where I was. Just how you are going to cite that case after that? Whose opinion are you citing?

Do you think judges should resist the temptation to file separate opinions if at all possible?

Judge **Greenberg**. Yes. Yes, I do, in a word. It is obvious that not only do I think it, I believe that. You know, Judge Leavy mentioned something here, and he is absolutely right, about the importance of the appellate court, if it is sending a matter back telling the trial judge what to do. And you are absolutely right, the trial judge has to be told and, you know, if you only sent a letter to him, do this and do that, with no reasoning in it, at least the trial judge would know what to do.

I absolutely do, I think that the courts have an obligation to try and harmonize the law, to try to make it clear and maybe on the Supreme Court level it may be different, but intermediate courts of appeal, which are obliged to follow the law, regardless of whether or not they particularly on a personal basis care for it. Yes, I think that they should avoid separate opinions.

Senator **Leahy**. You also have a commendable, a highly commendable record disposing of appeals quickly. The Third Circuit also has a pretty good record in that regard, but keep pushing them. I do not envy appellate judges anywhere in the country, because of the proliferation of appeals, but certainly if you have got ideas that can help in expeditious appellate case processing, feel free to pass them on.

Judge **Greenberg**. Well, we have had, Mr. Chairman—it was interesting, you asked the question about settlements on appeal. We have in the appellate division of the Superior Court of New Jersey a settlement process by which retired judges bring in attorneys and they are remarkably successful in disposing of cases and they settle a large number of cases pending on appeal, and the reason it works is that the judge who is conducting the settlement conference is a retired appellate division judge himself and he is able to realistically tell the lawyers, look, this is what you are confronted with on this. Unfortunately, they tend to settle the easier cases.

Senator **Leahy**. And you get stuck with the tough ones. [Laughter.]

Judge **Greenberg**. But it can work, yes, it can.

Senator **Leahy**. I agree. You time, time after time after time, in looking at cases to settle, usually the lawyers on both sides knew what a realistic settlement was. Sometimes having a judge who could sit down, call it a settlement judge or whatever, is just the impetus needed to bring the parties together. At that point you bring your file up, you talk to your parties, and then you finally have somebody say, look, this is the way we could finally settle this thing, which probably has been gathering dust over the years. And then the lawyers say let us bring it together. Usually when you have that third party stand there and say what the litigants on both sides know, "this is a fair settlement," then they have somebody else in the mix and they can do it.

I have thought many times if courts only had some kind of a facility like that, a lot of cases would be gotten rid of because people really want to settle in many instances.

Do you have any concern about making the transition to the federal bench from the State bench?

Judge **Greenberg**. No, Mr. Chairman, I do not. As a matter of fact, many of the rules are very similar to the rules in New Jersey. In New Jersey, the rules are to a large degree patterned on the Federal rules and I read the Federal Rules of Appellate Practice and there are some differences, some fine differences, differences on the type of interlocutory appeals that can be taken. It is remarkably similar. I am not really concerned about it. Plus I have had a lot of cases and written a lot of opinions on Federal law.

Senator **Leahy**. And then the standard question, have you ever been a member of any club or organization that discriminates in membership policies or practices on the basis of race, gender or religion?

Judge **Greenberg**. I was a member of a Kiwanis Club in the 1960s. I never frankly viewed it invidious. It did not admit women and I frankly never thought about it, but I heard recently that there is a lawsuit about it. I do not know that any applied actually, but I read now that the Kiwanis Club has a suit against them. Other than that, I would have to say no.

Senator **Leahy**. I have heard mention of the Elks Club and the Kiwanis Club. I do not think that either of those are clubs that ring the normal bells in our mind.

Judge **Greenberg**. I was a member of a college fraternity that was all men.

Senator **Leahy**. Senator Simon, do you have any questions?

Senator **Simon**. Just one brief question, Judge, and you may have answered and I got here late and I apologize. In going through your background, it is an exemplary background. There is just no question about it.

I did notice that in your seven years as appellate judge you filed only two dissenting opinions.

Judge **Greenberg**. Yes, sir.

Senator **Simon**. You have asked that question and I should ask the Chairman, is the answer satisfactory.

Senator **Leahy**. I was very impressed.

Senator **Simon**. Okay. Well, I will take the Chairman's word. I have no further questions and I thank you, Judge.

Senator **Leahy**. In fact, I intend to go back and get a copy of the transcript. I have a few judges back home I would like to show that to. [Laughter.]

Judge Greenberg, I understand your fiance is here, too.

Judge **Greenberg**. Yes, she is.

Senator **Leahy**. Would you like to introduce her?

Judge **Greenberg**. My children are here with her.

Senator **Leahy**. Good, we can have them all.

Judge **Greenberg**. Barbara Ann Kissel-Hoyler.

Senator **Leahy**. How do you do, ma'am. Thank you for coming.

Judge **Greenberg**. My two daughters, who live in Washington or the Washington area are here with their spouses, if I could present them.

Senator **Leahy**. Would you please stand.

Judge **Greenberg**. Elizabeth Greenberg and Robert Blecker, and Susanne Greenberg and Michael Smith.

Senator **Leahy**. I am delighted you are both here. You are probably pretty proud of your father.

Ms. **Elisabeth Greenberg**. Yes.

Ms. **Susanne Greenberg**. Yes.

Senator **Leahy**. You should be.

Thank you very much, Judge. Thank you for coming.

Judge **Greenberg**. Thank you, Mr. Chairman.

[Response to questions follow:]

QUESTIONS FOR JUDGE MORTON I. GREENBERG, OF NEW JERSEY, TO BE UNITED STATES CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Question

1. Judge Greenberg, would you tell the Committee how you feel about your own capacity at this point in your career to carry out the very significant power and responsibility of being a Circuit Court judge?

Answer

I feel that I do have the capacity to carry out the duties of a Circuit Court judge. I have been serving as a judge of the Superior Court of New Jersey, Appellate Division, for seven years.

The duties of a State Appeals Court judge are clearly in many ways like those of a Circuit Court judge and I think that I have shown that I have had the capacity to perform my duties on the State Appeals bench. In the circumstances it is reasonable to believe that I will be able to perform the federal duties also.

Question

2. Judge Greenberg, are there ever any circumstances where you would consider it appropriate to decide a case on some basis other than one where the intent of the framers of legislation or constitutional provisions can be detected, either through the text of a provision or its surrounding legislative history?

Answer

I believe that where the intent of the framers of the Constitution or legislation is clear it certainly should be followed and I really cannot conceive of circumstances which would justify a deviation. It should be noted, however, that constitutional provisions in some cases are general and thus do not specifically describe situations that may implicate them. In those circumstances changing circumstances could possibly justify changes in interpretations.

Morton I. Greenberg
March 11, 1987

Senator **Leahy**. The remaining nominee is James Zagel, and I will ask you to come forward and be sworn and then I am going to yield to Senator Simon who wishes to make an introduction.

Do you swear that the testimony you shall give here shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Zagel**. I do so swear.

TESTIMONY OF JAMES B. ZAGEL, OF ILLINOIS, A NOMINEE TO BE U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF ILLINOIS

Senator **Simon**. Mr. Chairman, if I may—and I speak in behalf of my colleague, Senator Dixon, also, both of whom are very pleased to endorse the nominee. Jim Zagel has background as a practicing attorney, in the field of prosecution, as an administrator. I think he has a wide enough background. He has been approved both by the bar association and the Chicago Council of Lawyers.

I would just say in general, Mr. Chairman, I think we have a nominee who meets the kind of standard that we demand and we should be demanding of Federal nominees. I will turn him over to your tender mercies at this point, Mr. Chairman.

Senator **Leahy**. Thank you very much. I will place in the record a statement by the other distinguished Senator from Illinois, Senator Dixon, on behalf of Mr. Zagel and a letter from Governor Thompson on behalf of Mr. Zagel.

I have a feeling, in looking at Governor Thompson's letter here, that it is quite possible I met you and Governor Thompson at about the same time at the National District Attorneys Association meeting in Chicago.

Mr. **Zagel**. We have met several times at the National District Attorneys Association when you were an officer and a prominent leader of that association. You had the goodness to invite me to a large number of speaking engagements in very scenic places and I am grateful.

Senator **Leahy**. Well, I was just going to talk about the Chicago ones. Those are always the working ones. [Laughter.]

I should mention, Paul, that sometimes for security reasons we would have to meet in places like Key Biscayne, San Juan—I do not think I ever came to the San Juan one.

Mr. **Zagel**. Yes, sir, I——

Senator **Simon**. I am going to reconsider this nominee here. [Laughter.]

Senator **Leahy**. Well, I want you to know, Paul, that I was at one time an officer of the National District Attorneys Association. I was first on the Board of Directors and then became Vice President of it, and was about to have the power and the glory of being President of that organization when in the year I was to become President I gave it all up for the anonymity of the U.S. Senate and I have never been able to get back into something interesting since. That was back when we did meet and Mr. Zagel did make it a point to come and speak to us.

Those actually were very good meetings. I must admit, we did pick some of the nicest places in the country to meet, but I think we also got a lot out of it.

Mr. Zagel, did you want to make any kind of an opening statement?

Mr. **Zagel**. I would just reiterate what the previous nominees have stated, that this is a great honor to get to this point in the process and I particularly, as interested as I am in history, am impressed by the fact that this is the 100th Congress and I am especially honored to be at this first hearing.

Senator **Leahy**. Thank you.

[The material earlier referred to follows:]

Statement by Senator Alan J. Dixon
on behalf of James B. Zagel of Illinois
March 11, 1987

Mr. Chairman, members of the Committee, it is my distinct pleasure to introduce to you Mr. James B. Zagel of my own state of Illinois. Jim is presently the Director of Illinois State Police. I believe he will make a first class District Judge, and I recommend him without reservation.

Born in Chicago, Illinois, Jim Zagel recieved his B.A. from the University of Chicago. He continued on to Harvard Law Scool, eventually joining the State's Attorney's office of Illinois. From that point on, Jim Zagel's career in the Illinois criminal justice system has exemplified a strong commitment to the law and fair play.

I know the Committee will be as impressed as I am with Jim Zagel's clear potential to serve our system of justice in the Northern District of Illinois. As I examine his qualifications, I note Jim's understanding of what society will expect from him as a judge: neutrality, compassion and a precise knowledge of the law.

Members of the Committee, these are qualities we cannot afford to pass over in a nominee. I respectfully urge favorable consideration of James B. Zagel to be United States District Judge for the Northern District of Illinois.

STATE OF ILLINOIS
OFFICE OF THE GOVERNOR
CHICAGO 60601

JAMES R. THOMPSON
GOVERNOR

March 6, 1987

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Senate Office Building - 489
Washington, D.C. 20510

Re: James B. Zagel

Dear Mr. Chairman:

I write on behalf of James B. Zagel of Illinois who has been nominated by the President and is under consideration by the United States Senate for appointment as United States District Judge. Mr. Zagel is scheduled to appear before the Committee on the Judiciary on Wednesday, March 11, 1987. I know Mr. Zagel to be a man of integrity, intellect, wisdom, character and compassion. Those qualities have made their mark in Illinois during his decades of experience as a lawyer, scholar and public servant. He is a man who can and with the concurrence of the United States Senate, will well and faithfully discharge the duties of United States District Judge. He will serve the citizens with honor and distinction.

Sincerely,

James R. Thompson
GOVERNOR

Senator **Leahy**. Your resume, especially in the field of criminal law, is very, very impressive, both in terms of practice and scholarship. You have been out of the courtroom though for most of the last decade. Is that correct?

Mr. **Zagel**. Yes, sir.

Senator **Leahy**. How have you kept up to date in developments of trial practice?

Mr. **Zagel**. Well, I have kept up to date in most of the developments of trial practice largely because I have had to edit the continuing editions of the Casebook which is used in law schools and undergraduate schools throughout the country, and basically you have to revise them about every four years and you have to put out a supplement pocket part each year, and I have kept up with the developments in criminal procedure in that way.

Also, as a director of two large State agencies, we are engaged in a pattern of substantial litigation on the civil side and as a result of dealing with those cases I think I have kept relatively current even in the civil procedure area as well.

Senator **Leahy**. Now, you stated that your practice having been primarily that of a prosecuting attorney. I do not want to suggest in any way that that is a bad background for somebody seeking any type of Federal office.

Senator **Simon**. You particularly do not suggest that.

Senator **Leahy**. I particularly do not suggest that. [Laughter.]

But it raises two basic questions: One of course is that the court to which you have been nominated has a docket that is predominantly a civil docket. First, does that raise problems in your own mind? Secondly, as a prosecutor, and I probably know as well as anybody here, you are very, very much an advocate for your position. You are the State in many ways, and that develops, like it or not, a certain mind set. Do you see any difficulty in removing that mind set so that you do not become a prosecutor's judge any more than you should be a defense judge?

Mr. **Zagel**. Well, I think it is very important that if there is a mind set that it be removed. There is nothing more corrosive in a courtroom for the bench to be an extra prosecutor or an extra defense counsel, and I have seen courtrooms where that has occurred and it is not a pleasant sight.

To answer the second part of your question first, I think that many prosecutors, many career prosecutors have successfully made the step to neutrality as judges. Frankly I think I have been helped in this regard by the long tenure I have had as a police chief, because a prosecutor frequently is handed a case in court, and has a certain institutional desire to do well with that case, no matter what the quality of the case, although most resist that temptation.

In my job, I have had to take a look at files and raw evidence and a lot of data and make a determination whether there is really fair ground to charge or take a case to a prosecutor in the first place, and I have tried to look at those cases not from the point of view of whether we can arrest and successfully charge this individual, but is this a fair charge and does the evidence fairly support it.

So I think the transition to neutrality of a judge is one that I hope, if I am confirmed, I can make.

As far as the civil nature of the proceedings in the District Court, I suppose that the District Court's jurisdiction is so broad that there is no single nominee who ever comes to the District Court with all of the requisite experience and equipment needed to serve adequately. There is a learning period I think for every new judge.

I have had a great deal of criminal experience, but I have had significant civil experience as well. As an Assistant Attorney General, I have appeared in the Federal District Courts with a great degree of frequency. We were defending civil rights suits filed against State officers and some pendant State law claims as well, but those cases were all tried under the Federal Rules of Civil Procedure and I am familiar with the practices involving those rules.

Moreover, I was Director of Revenue for the State of Illinois for a year and a half and had a very substantial experience there in dealing with tax matters, in fact occupying a quasi-judicial position because the decisions of the Director of Revenue on tax law issues in Illinois are subject to administrative review only and not tried anew in the Circuit Courts of the State.

So I have had, I think, a reasonable degree of civil experience and I do not have an enormous concern that I will not be able to master the civil work of the court, although I cannot tell you that it will come without effort. I suspect that it will take a great deal of effort and work on my part to fully prepare myself for the civil side.

Senator **Leahy**. I appreciate the candor in that response.

Let me ask you a question. With your law enforcement involvement—I realize the police many times have to make certain legal judgments themselves at the beginning—and seeing courts now reassessing aspects of the *Miranda* decision, did you ever find in law enforcement in your experience that they were unduly hampered by the requirement to give a Miranda warning?

Mr. **Zagel**. There are many cases in which it has no effect at all. There are, however, a substantial number of cases, a minority number of cases but still a substantial number, where it may possibly affect the outcome.

The thing I think to understand about Miranda and other rules of that sort is that they represent the striking of a balance between the rights of society, perhaps, to domestic tranquillity, as it is expressed in the Constitution, and the rights of the individual to be free from oppressive government action.

There is no way to strike that balance without having a cost paid on either side. I personally do not believe that the cost in terms of escaped criminals in Miranda has been a particularly high one. Although at the time the decision was rendered, there was an enormous furor and I remember it well because I was an Assistant States Attorney in Cook County the day the Miranda decision came down, and I can recall driving out to the Commerce Clearinghouse printing plant, because the Chicago Police Department kept calling and saying what do we do today, and we did not feel we could rely on the AP report of the——

Senator **Leahy**. I remember it the same way. I remember getting a printing plant opened up that night to print up the first Miranda cards to pass out to everybody in my own jurisdiction.

As part of your duties as Director of State Police, you supervised the operation of the State Crime Laboratory, is that correct?

Mr. Zagel. Yes, sir, I did.

Senator Leahy. And there has been some controversy recently about the operation of these labs, and let me ask you a couple of questions about that. A couple of years ago, the *Gary Dotson* case made national headlines. Dotson, of course, was first convicted of raping Kathleen Crowell Webb in 1979. Now, that was before your tenure as Director of the State Police, is that correct?

Mr. Zagel. Yes, sir.

Senator Leahy. Then in 1985, Ms. Webb recanted her story, there were further proceedings for post-conviction release, and in those further proceedings, did you participate in your official capacity?

Mr. Zagel. I participated in my official capacity in the Governor's pardon hearing. My department, in connection with the post-conviction remedy, did some retesting of some of the scientific evidence in that case.

Senator Leahy. In fact, a lot of doubt was cast on some of the scientific evidence which had led to Dotson's conviction in the first place. I am referring particularly to the testimony regarding the results of tests on semen stains on the victim's clothing. Do you recall that being questioned?

Mr. Zagel. Yes, sir, I do.

Senator Leahy. And at one point a forensic scientist named Timothy Dixon, I understand from the report, who was employed at the State Police Lab, submitted an affidavit acknowledging errors in some of the testing which he attributed to the use of a defective agent called H-lectin. Is that correct? And when did you learn about the problem of the defective H-lectin?

Mr. Zagel. I learned about the problem essentially when the rest of the public did. The administration of the forensic science section of my department had corrected or had discarded the use of that particular form of test sometime either shortly before or shortly after I became Director. We had not used that particular form of test. My recollection is the testimony of Mark Stolorow, who was one of our senior forensic scientists, was that, at the time Mr. Dixon ran his tests, perhaps 50 percent of the laboratories in the Nation used that test, but that it was rapidly falling into disuse because of questions as to its ability to discriminate among various types of semen.

We have now in our laboratories and have had ever since we were honored by becoming the first laboratory in the Nation to be accredited by the State Crime Laboratory Directors Association, a program of research laboratories and training and applications laboratories whose sole purpose is to see that the tests that we use we do not continue to use when they have been supplanted and superseded by better and more accurate tests.

The test used in *Dotson's* case was not the best test available at that time and we have set forth procedures to see that we do not get into that situation again.

Senator Leahy. Did you go back to find out if any other cases had been tainted by that test?

Mr. **Zagel**. We notified the various States Attorneys, at least I believe our laboratory notified various States Attorneys. There was no way we could tell from our records whether—well, let me make a preliminary statement: 90 percent of the work that we do we do for other agencies, we do not do it for ourselves, we do not do on our own cases.

We get a piece of evidence, we write a report and we send it either to the States Attorney or the police department. I believe, but I am not certain, that there have been requests for retesting after the *Dotson* case.

Senator **Leahy**. In fact, the magazine Chicago Lawyer said that, based on Mark Stolorow's affidavit that the H-lectin had affected all the tests performed up to June 1979, is that correct?

Mr. **Zagel**. I do not remember his specific testimony on that point.

Senator **Leahy**. So you do not know if other cases were affected?

Mr. **Zagel**. I do not know if other cases were affected.

Senator **Leahy**. And the only steps that were taken were to notify the States Attorneys that had had cases——

Mr. **Zagel**. I do not know that step was taken either. I know that as a result—the *Dotson* case received enormous publicity within the State of Illinois and I do not know if we received requests or State Attorneys offices received requests or the police departments received requests from persons who were incarcerated or from defense lawyers or from others for retesting. I simply do not know what the course of action was, and part of that has to do with the fact that the case really is not within our control. Once the case is prosecuted, our laboratory policy is to rely on requests of the States Attorneys and orders of the court and request of defense counsel for further steps.

Senator **Leahy**. Now, you spoke of the certification of the lab. I understand there were also requests under Illinois FOIA or Freedom of Information Act for disclosure of the results of the National Forensic Science Association tests administered to employees under your supervision. Are those results going to be made public or are you declining to release those results?

Mr. **Zagel**. That is a matter that is presently under litigation. We have I believe only one set of results. The question that is before the Circuit Court of Cook County now is whether that test constitutes essentially a personnel transaction, a personnel examination, which is exempted from the law.

If the court believes that it is not exempted from the law, then of course we will produce the results that we have.

Senator **Leahy**. In the *Dotson* case, did you testify at the hearing convened by Governor Thompson?

Mr. **Zagel**. Yes, sir, I did.

Senator **Leahy**. Do you recall whether you testified concerning some confirmatory tests that had been undertaken by Henry Lee of the Connecticut State Police of the semen stains in that case?

Mr. **Zagel**. Yes, sir.

Senator **Leahy**. Did you enter that report into the record or did you simply testify concerning the report?

Mr. **Zagel**. I did not enter the report. I did not have the report. The morning I testified, I spoke with Dr. Lee by telephone and I asked Dr. Lee if the results reached by Mark Stolorow, who was employed by my lab, were confirmed by his test results and he said they were.

Senator **Leahy**. Did you ever have a copy of the report itself?

Mr. **Zagel**. I do not recall ever seeing Dr. Lee's report, no.

Senator **Leahy**. Has there been some dispute as to whether the report went as far as your testimony indicated it did?

Mr. **Zagel**. I recall that Mark Stolorow had a discussion with me about the question of whether some further form of testing might be desirable, but I do not recall Stolorow's discussion with me as to any other dispute as to, whether I had accurately reported Dr. Lee's results. It is fairly clear to me that my conversation with Dr. Lee, since I did not understand the scientific principles or the scientific tests, was very elementary. I simply asked him if he had agreed with Stolorow's results and he said yes. I engaged in no technical discussions with Dr. Lee.

Senator **Leahy**. Was Timothy Dixon promoted after the problem over the defective H-lectin?

Mr. **Zagel**. I do not know. He was not to my knowledge promoted after I was aware of this problem.

Senator **Leahy**. But you would approve the promotion for him when he was promoted?

Mr. **Zagel**. In the technical sense, certainly. I have to say that I have about 3,000 employees and below the level of superintendents as such, in the civilian areas, my approval is pro forma.

Senator **Leahy**. As Director of the State Police, are you generally involved in decisions as to whether to subject evidence to new kinds of testing?

Mr. **Zagel**. No, sir.

Senator **Leahy**. You are not the one who does that?

Mr. **Zagel**. No.

Senator **Leahy**. I will have a series of other question for the record in this regard.

Have you ever been a member of a club or other organization that discriminates in membership policies or practices on the basis of race, gender or religion?

Mr. **Zagel**. Other than a college fraternity, no.

Senator **Leahy**. I'm sorry, other than a college fraternity?

Mr. **Zagel**. No.

Senator **Leahy**. Senator Humphrey?

Senator **Humphrey**. Thank you.

Is this the Select Democratic Panel on Nominations?

Senator **Leahy**. No, unless Senator Thurmond, who was here for the first part of this hearing suddenly made a radical change in his political philosophy, and we will welcome him at any time, of course, as there is I do believe a redemption for all. [Laughter.]

No, this is the Senate Judiciary Committee.

Senator **Humphrey**. I am glad, but I keep looking for this thing I read so much about in the newspapers, the Select Democratic Panel on Judicial Nominations.

Senator **Leahy**. You must have been reading different newspapers than I, but feel free to go ahead with your questions.

Senator **Humphrey**. Thank you. Thank you. I appreciate the opportunity.

Actually, I note, Mr. Zagel, that you got your degree from Harvard.

Mr. ZAGEL. Yes, sir.

Senator HUMPHREY. It seems to be the only black mark on your record.

I really do not have any questions for the nominee. They all seem to be, this nominee as well as the others, seem to be very, very well qualified. There is no point in making things any more complicated than they already are. I do not know why anybody would want to be a judge, frankly. It seems like a velvet prison to me, but it is an important responsibility and we are glad that so many well qualified candidates are interested.

Mr. ZAGEL. Thank you, Senator.

Senator HUMPHREY. Senator Simon?

Senator SIMON. First of all, I want to join Senator Leahy in saying we welcome you to the Democratic Party any time, Senator Humphrey.

Just one question, and really you have touched on the bulk of this: The members of the Committee were sent an article by Rob Ward, and let me just quote from it, because I think you ought to have a chance to respond to that. It said his department—speaking about you—has used false forensic evidence to help Cook County prosecutors secure convictions in at least two important cases. And then skipping a paragraph, it says:

> Zagel has done nothing to right the wrongs in either of those cases or the unknown number of other cases in which similar mistakes undoubtedly occurred. Instead, he and his boss, Thompson, have engaged in a coverup, no doubt hoping that the scandal will not blow up while Thompson is seeking reelection and Zagel is seeking appointment to the Federal judiciary.

Do you want to respond to that?

Mr. ZAGEL. Well, I am aware of two cases, and forensic laboratories do about 4,000 cases a year. I am aware of two cases. One is the *Dotson* case and there was another case that Mr. Warden has previously referred to in which he claims evidence was erroneously analyzed.

Could evidence be erroneously analyzed by the forensic scientists in our laboratories? Of course it could. That is why the State Police Forensic Laboratories are not the final world. They have to withstand the scrutiny of the judge and the jury and the defense counsel when they present this in court.

An error was made in the *Dotson* case. As soon as the error was brought to our attention, we did all that we could consistent with the facts, as the case was in the charge of the States Attorneys Office of Cook County, to rectify that error.

With respect to the other case, I am told that there is still a scientific dispute as to what the correct analysis in that case involved. That case also came to my attention well after its occurrence and I believe the scientific analysis occurred before my tenure as the Director.

That case I am told was recently retried in the Circuit Court of Cook County without the evidence in question and the individual was again convicted, so a question arises as to how significant the evidence was.

We have never taken the position that we run perfect laboratories. We cannot do it. They are run by human beings, but we have tried to do the best we can and we have never knowingly falsified evidence. It is about the worst thing a police chief or a prosecutor can do and there is not really anything worse that can be said about an individual. And if that is the statement that was made, I categorically deny it.

Senator **Simon**. That is a good answer. Thank you.

Senator **Leahy**. Mr. Zagel, I wonder if you could stay a moment and talk with the staff. I want to give you a further and detailed question in that subject that can be answered in writing for the Committee.

Mr. **Zagel**. Yes, sir.

Senator **Leahy**. That will speed things ahead here.

[Additional material follows:]

QUESTIONS FOR JAMES B. ZAGEL, OF ILLINOIS, TO BE UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Question:

1. Mr. Zagel, your legal experience has been primarily within the State of Illinois' criminal justice system. Would you tell the Committee how this experience has prepared you for the position of United States District Court Judge?

ANSWER:

The Illinois judicial system operates under laws and procedures similar to those of the federal system. There is a substantial commonality in the experience of state and federal court work in Illinois and this serves to prepare me for the position of United States District Court Judge. Moreover, as an Assistant Illinois Attorney General, I represented the State and its officers in many cases in federal court and have experience in litigation in federal court. As an author of casebooks used in colleges and law schools I have been required to maintain currency in developments of federal law and procedure. Finally, a significant number of my State Police cases are investigated for purposes of prosecution in federal court and this assists me in understanding the federal criminal code.

Question:

2. Mr. Zagel, one of the criticisms of judicial activism is a tendency by the judiciary to employ the individual plaintiff as a vehicle of the imposition for far-reaching orders extending to broad classes of individuals. Do you feel that this criticism is valid, and would you please explain?

ANSWER:

I believe it is improper for a District Judge to employ an individual plaintiff as a vehicle for the imposition of far reaching class orders affecting individuals who have had no say in the decision. It is most important for judges to decide the cases presented to them and not the cases they might wish to decide. To use an individual plaintiff as a tool to create jurisdiction to impose broad orders violates this principle.

James B. Zagel
March 11, 1987

March 13, 1987

The Honorable Patrick Leahy
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Leahy:

At my appearance before the Committee I was asked to answer additional questions. I submit a sworn affirmation of my answers since the questions were asked of me when I was under oath.

1. Was Mr. Timothy Dixon's analysis of semen conducted by methods generally in use in 1977? When was the method changed in Illinois?

   In 1977 Tim Dixon, an employee of the Department of Law Enforcement (now State Police) performed a test to detect H antigenic activity in semen. He used a commercially prepared substance called H-Lectin. In 1977 it is estimated that 50% of crime laboratories followed this procedure. In June, 1979, the Department hired Mark Stolorow at whose recommendation the Department laboratories began using a form of H-Lectin produced within the laboratories. This internally produced substance is far stronger than the commercial product and produces a more valid result. All of these events--Mr. Dixon's test, Mr. Stolorow's retention and the change in procedure occurred prior to my becoming Director on August 16, 1980.

2. Did I promote Mr. Timothy Dixon?

   The last promotion of Mr. Dixon occurred, according to state records, on June 1, 1979, a little more than a year before I became Director. Subsequent changes in his assignments were lateral transfers, not promotions. In any event, in the ordinary course of business the Director will not personally decide the question of promotion of a civilian employee of Mr. Dixon's rank.

3. What efforts, if any, were made with respect to identifying and retesting evidence analyzed by the method used in the Dotson case?

   In 1985, after our laboratories discovered the error in Dotson's case, the Superintendent of the Division of Forensic Services and Identification determined that identification and routine retesting of H-Lectin cases prior to mid-1979 would be administratively and scientifically impractical if not impossible. The policy he adopted was to retest, if possible, in any case where we were requested to do so.

Despite the massive publicity which accompanied the Dotson hearing, the H-Lectin testing issue and the Department's willingness to retest, if possible, as we did in the Dotson case, the Illinois State Police has not received a single request for retesting from any lawyer, prosecutor, judge, petitioner-defendant or other interested party.

4. Did I misrepresent the statements of Dr. Henry Lee in my testimony at the Governor's hearing?

   I did not. Prior to my testimony in the Governor's clemency hearing I spoke to Dr. Henry Lee of Connecticut. I asked him if he had performed the tests that Mark Stolorow had requested. He replied that he had. I then read to him verbatim a list of statements that Mr. Stolorow made to me. I asked Dr. Lee if his tests confirmed all of these statements. He responded that they did. I asked if he agreed with Stolorow's opinion. He said yes. The conversation ended with his statement that he would send a report later and a question about the state voucher process.

During my tenure as Director, procedures were instituted to insure that our scientific testing would be as advanced as possible. A Training and Applications laboratory was staffed and implemented, and a research laboratory was begun. In 1982 the laboratory system was the first in the nation to be accredited under the rigorous standards and inspection of the American Society of State Crime Laboratory Directors.

If the Committee requires any additional information I shall be pleased to provide it.

Respectfully submitted,

James B Zagel

James B. Zagel

A F F I D A V I T

I, James B. Zagel, do swear that the information provided in this letter is, to the best of my knowledge, true and accurate.

James B Zagel
(Name)

March 13, 1987
(Date)

(Notary)

March 31, 1987

The Honorable Patrick Leahy
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Attention: Mr. Steven Metalitz

Dear Senator Leahy:

In response to your letter of March 19, 1987, I answer the question you proposed. I submit a sworn affirmation of my answer since all other questions were answered under oath.

> Question: What was your personal involvement in the decision made by the Superintendent of the Division of Forensic Sciences and Identification that it would be impractical to identify or retest H-lectin cases prior to mid-1979?

I had no personal involvement in the Superintendent's decision. Sometime in 1985, after the State Police retested the Dotson evidence, I was with the Superintendent and the Assistant Director of State Police to discuss various matters relating to laboratory funding and computer criminal histories. At that discussion, I suggested to the Superintendent that he study and adopt a policy with respect to H-lectin tests prior to mid-1979, and he stated he would do so. I had nothing else to do with this matter.

Respectfully submitted,

James B Zagel

James B. Zagel

JBZ:fo

AFFIDAVIT

I, James B. Zagel, do swear that the information provided in this letter is, to the best of my knowledge, true and accurate.

James B Zagel
(Name)

March 31, 1987
(Date)

Florence J. Ostrowski
(Notary)

Chicago Council of Lawyers

One Quincy Court Building • Suite 800 • 220 South State Street • Chicago, Illinois 60604 • (312) 427-0710

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Malcolm C. Rich
Executive Director

April 7, 1987

Senator Paul M. Simon
462 Dirksen Senate Building
Washington, D.C. 20510

Dear Senator Simon:

Pursuant to your request, the Chicago Council of Lawyers has evaluated the qualications of James B. Zagel for appointment as a judge on the United States District Court for the Northern District of Illinois. The Council's evaluation of Mr. Zagel consisted of reading his published articles and papers, interviewing lawyers with whom and against whom Mr. Zagel has practiced, interviewing people in state government who have worked with Mr. Zagel, and conducting a lengthy interview of Mr. Zagel.

As we have stated in previous letters to you regarding other candidates for the federal district court bench, the standard by which the Council judges such candidates is as follows:

> The Council believes that candidates for the federal district court bench should be persons of the highest integrity who have demonstrated superior intellectual ability and excellence in legal practice preferably in the context of federal litigation and trial experience.

The Council concludes that Mr. Zagel meets this standard, and that Mr. Zagel is therefore qualified to be a federal district court judge.

Mr. Zagel graduated from the Harvard Law School in 1965. He then joined the Cook County State's Attorney's office and remained there until 1969, when he became an Assistant Illinois Attorney General. In both the State's Attorney's and Attorney General's offices, Mr. Zagel gained significant litigation experience in Illinois trial courts, appellate courts, federal district courts, and in the United States Supreme Court. Mr. Zagel left the Illinois Attorney General's office in 1977 to become Executive Director of the Illinois Law Enforcement Commission. From 1979 to 1980 he was Director of the Illinois Department of Revenue. From 1980 to the present he as been Director of the Illinois Department of Law Enforcement.

Mr. Zagel is uniformly viewed by those who have practiced with and against him and by those with whom he has interacted in state government as having an outstanding intellect. In fact, many of those we interviewed referred to Mr. Zagel as "brilliant." The responsibility that Mr. Zagel was given early in his career for the trial and appeal of significant cases indicate that his supervisors viewed his legal skills as outstanding. Lawyers who appeared with and against Mr. Zagel while he was practicing law thought his legal work was excellent. In addition to performing exceptionally well as an advocate while he was practicing law, Mr. Zagel also engaged in scholarship and lecturing. He is a co-author of one of the most widely used law school casebooks on criminal law, has written scholarly articles, and has lectured widely on criminal law and law enforcement topics. Mr. Zagel's work as a government administrator is also viewed by those who know his work as outstanding.

The Council was concerned about the fact that Mr. Zagel has not been engaged in the day-to-day practice of law since 1977 and, moreover, that when Mr. Zagel was practicing law most of his experience was confined to the state courts. Although Mr. Zagel has some federal trial experience, it is not as extensive as one generally would like for a potential federal court judge. The Council has considered this issue and has resolved it in favor of finding Mr. Zagel qualified. There are a number of reasons for this conclusion. First, everyone we talked to believed that Mr. Zagel possessed the intellectual ability to learn quickly what he now may not know about federal practice and procedure. In addition, Mr. Zagel's fairly extensive state court trial and appellate experience, as well as his experience in arguing significant cases before the state and federal appellate courts including the United States Supreme Court, convinces us that Mr. Zagel has sufficient litigation experience to prepare him for the bench.

We were also convinced by our interview of Mr. Zagel that even though he has not practiced law for some time, he has kept abreast of legal issues and, furthermore, that he has a scholarly interest in the law and in the process of judging. We found his answers to our questions about his perception of the judicial role most thoughtful. Finally, his experience as chief administrator of large state agencies will be of great assistance to him in managing the heavy caseloads of the federal district court.

The Council was also concerned about the issue raised at Mr. Zagel's hearing before the Senate Judiciary Committee regarding testing of semen samples in the state's crime laboratory. As you know, the Gary Dotson case brought to light deficiencies in the procedures employed by the Illinois Department of Law Enforcement's crime laboratory in the testing of semen samples. The defective testing uncovered by the investigation of the Dotson case occurred before Mr. Zagel became Director of the Illinois Department of Law Enforcement. However, once it was discovered that defective testing procedures were employed, nothing was done by the Department on its own initiative to determine whether defective tests resulted in other potentially false positive comparisons. Mr. Zagel told us, as he has told your Committee, that it would have been impracticable, if not impossible, to identify and retest in all of the instances in which defective procedures were employed. Mr. Zagel also told us, as he told your Committee, that his Department's laboratory adopted a policy of retesting upon request. The Council wishes that the Department of Law Enforcement had done more to determine whether or to what extent potentially false positive tests could be identified. Moreover, the Council believes that given the rather complex nature of the forensic issue involved very few potentially affected prisoners would know enough to request retesting of the scientific evidence in their cases. Finally, the Council is disturbed that the State of Illinois continues to resist Freedom of Information Act requests for documents relating to semen testing and the qualifications of personnel who perform those tests.

Despite the foregoing concerns, the Council believes that Mr. Zagel is qualified to be a federal district court judge. The defective procedures were employed before he became Director of the Department of Law Enforcement and were corrected after he became Director. Mr. Zagel's reliance upon his chief laboratory administrator's conclusion that it would have been impracticable, if not impossible, to retest in all cases may have been reasonable. The state's legal position on the pending freedom of information request is a colorable one and will be resolved by the state courts. While the Council would like to see the issues surrounding alleged defective testing resolved as quickly as possible, it cannot conclude, based on the evidence before it, that Mr. Zagel has acted unreasonably with respect to his handling of this matter. In fact, we are convinced based on talking to Mr. Zagel and to the people who know him well as a colleague and as an adversary, that he is fair-minded and principled.

Some attorneys to whom we spoke were concerned that Mr. Zagel might not be fair in criminal cases because of a perceived "hard nosed" attitude toward the enforcement of the criminal law. The overwhelming majority of those who expressed this concern, however, thought that Mr. Zagel would be fair and that he would follow the law. Many defense lawyers who knew him as a prosecutor and who know him now as Director of the state's major law enforcement agency told us that they would not hesitate to appear before Mr. Zagel should he become a judge. We conclude, based on the interviews that we conducted, that Mr. Zagel's zeal as a prosecutor and law enforcement officer should not prevent him from being fair and impartial in criminal cases.

Thank you for considering our evaluation of Mr. Zagel. Please do not hesitate to call us if you have any questions about our evaluation.

Very truly yours,

Thomas F. Geraghty

Thomas F. Geraghty
Chair
Federal Judicial
Evaluation Committee

TFG:pv

cc: James B. Zagel
Deborah Leavi

Senator **Leahy**. I should also note for the record that each nominee has completed a detailed questionnaire that has been put together by the Judiciary Committee. There is a great deal of information in this questionnaire. Anybody who may be following these hearings may hear a lot of questions that we did not ask because they have probably been asked in the questionnaire. A great deal of that questionnaire is publicly available as the nominees know and, of course, the publicly available portion of the nominees' response as to the questionnaire will be made part of the record and that will be the standard practice on each nomination.

I thank all of you for being here and we will now stand in recess.

[Whereupon, at 3:38 p.m., the committee was in recess, subject to call of the Chair.]

[Material referred to follows:]

BIOGRAPHY

EDWARD LEAVY

Birth:	August 14, 1929	Aurora, Oregon
Legal Residence:	Oregon	
Marital Status:	Married	Eileen Hagenauer Leavy 4 children
Education:	1957 - 1950	University of Portland A.B. degree, cum laude
	1950 - 1953	University of Notre Dame LL.B. degree, cum laude
Bar:	1953	Oregon
Experience:	1953 - 1954	Sole practitioner Eugene, Oregon
	1954 - 1957	Deputy District Attorney Lane County Eugene, Oregon
	1957 - 1961	District Judge Lane County District Court
	1961 - 1976	Circuit Judge Lane County Circuit Court
	1974	Justice, Pro Tempore Oregon Supreme Court
	1976 - 1984	United States Magistrate District of Oregon
	1984 - present	United States District Judge District of Oregon
Office:	U.S. Courthouse 620 S.W. Maine, Room 114 Portland, Oregon 97205 503 221-3800	
Home:		

To be United States Circuit Judge for the Ninth Circuit

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Q: Full name (include any former names used).

A: Edward Leavy

2. Q: Address: List current place of residence and office office address(es).

A: Office: Room 114, U.S. Courthouse
620 S.W. Main
Portland, Oregon 97205

Home: 14375 S.W. 164th
Tigard, Oregon 97224

3. Q: Date and place of birth.

A: August 14, 1929
Aurora, Oregon

4. Q: Marital Status (include maiden name of wife or husband's name(List spouse's occupation, employer's name and business address(es).

A: Married
Eileen Leavy (nee Hagenauer)

5. Q: Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

A: University of Portland
1947-50
A.B. cum laude, Business Administration
1950

University of Notre Dame
1950-53
LL.B., cum laude
1953

6. Q: Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

A: 1959 (vice-president) Oregon District Judges
1971 (president) Oregon Juvenile Judges Association
1973 (president) Oregon Circuit Judges Association

February 1979 to October 1979, I was a general partner with my son Patrick in the operation of our family farm.

My wife and I own 193 acres of farm land at 22675 Butteville Rd. Aurora, Oregon. Most of the farm is leased to Leavy Farms, Inc. One hundred percent of the stock of Leavy Inc. is owned by our sons Patrick and Paul Leavy. Fifteen acres of the farm are being planted with filberts, which my wife and I will operate as an enterprise.

7. Q: Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

A: None

8. Q: Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

A: None

9. Q: Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any office which you have held in such groups.

A: Oregon State Bar
American Bar Association
Lane County Bar Association
Multnomah Bar Association

1979-82 Member, Oregon State Bar Committee on Uniform Jury Instruction.

1969-76 Member, Oregon Judicial Conference Committee on Uniform Jury Instructions

1976 Member, Executive Committee on Oregon Judicial Conference

1976 Chairman, Advisory Committee on Court Services for Oregon Children's Service Commission

Current member, Jury Utilization Committee of the Ninth Circuit Conference

Current member, Calendar Management Committee, U.S. District Court for the District of Oregon

1980-82 Member, Local Rules Committee, U.S. District Court for the District of Oregon

1983 Member, Admiralty Rules Committee, U.S. District Court for the District of Oregon

10. Q: Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organization to which you belong, (such as civic, educational, "public interest" law, etc.)

A: None

11. Q: Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

A: Supreme Court of Oregon and all Oregon state courts
September 1953

U.S. District Court for the District of Oregon
July 1954.

U.S. Treasury
1954.

12. Q: Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

A: None

13. Q: Health: What is the present state of your health? List the date of your last physical examination.

A: Excellant
July 18, 1986

14. Q: *Judicial Office* (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

A: January 1957 to January 1961
District Judge, Lane County District Court
Appointed January 1957, elected to six-year term in 1958
Jurisdiction: Civil Cases up to $1000 and misdemeanors.

January 1961 to October 18, 1976
Circuit Judge, Lane County Circuit Court
Elected to three six-year terms
Jurisdiction: general, unlimited

October and November 1974
Justice, Pro Tempore, Oregon Supreme Court
Temporary appointment
Jurisdiction: appellate jurisdiction over final decisions of circuit courts: original jurisdiction in mandamus, quo warranto, and habeas corpus proceedings.

October 18, 1976 to May 18, 1984
United States Magistrate
Appointed, eight year term
Jurisdiction: *see* 28 U.S.C. § 636, governing the powers and duties of federal magistrates.

May 18, 1984 to present
United States District Judge
Lifetime appointment by President Reagan
Jurisdiction: *see* U.S.C. § 1331 *et seq*.

15. Q: *Citations*: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where you decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

A: (1) *State v. Buchanan*, *aff'd*, 250 Or. 244, 436 P.2d 729, *cert. denied*, 392 U.S. 905 (1968)

Olsen v. State ex rel Johnson, *aff'd*, 276 Or. 9, 554 P.2d 139 (1976)

State ex rel Juvenile Department v. Brown, *aff'd* 19 Or. App. 427, *cert. denied*, 421 U.S. 1003

Cochran v. Brooke, *aff'd*, 243 Or. 89, 409 P.2d 904 (1966)

Air Algerie v. Evergreen National Airlines, Inc., Civ. No. 85-563 (D. Or. Feb. 20, 1986)

Thompson v. Shell, Civ. No. 84-563 (D. Or. Oct. 15, 1985)

Allen v. Watson, et al., Civ. No. 85-905 (D. Or. Apr. 2, 1986) (pending on appeal to Ninth Circuit Court of Appeals)

U.S.A. v. Gonzalez, 800 F.2d 895 (1986)

Lampros v. Merrill Lynch, Civ. No. 85-684 (D. Or. Oct. 3, 1985)

Hammerquist v. Clark Sheet Metal, Civ. No. 76-766 (D. Or. Aug. 3, 1978)

(2) See attached list. The computer search dates from 1969 only. My records are incomplete before that date.

(3) Allen v. Watson, Civ. No. 85-905 (Pending on appeal to Ninth Circuit Court of Appeals

U.S. A. v. Gonzalez, 800 F.2d 895 (1986)

Olsen v. State ex rel Johnson, 554 P.2d 139 (1976)

16. Q: Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

A: March 1954 to January 1957
Deputy District Attorney for Lane County, (Eugene, Oregon). Appointed.

In 1960, I was a candidate for election to position #1 on the Lane County Circuit Court. Position #2 subsequently became vacant. A poll of Lane County lawyers gave me first preference for appointment to that vacancy. Governor Mark O. Hatfield, (now U.S. Senator), appointed Roland K. Rodman to fill position #2. I was then elected to position #1.

In 1969, I was included in a list of eight persons recommended by past presidents of the Oregon State bar for appointment to the Oregon Federal District court. Judge Alfred T. Goodwin, (now on the Ninth Circuit Court of Appeals), was appointed.

I was ranked fourth in a statewide bar poll in 1973, for a vacancy on the Oregon Court of Appeals. Governor Tom McCall appointed Jacob Tanzer, who later became an Oregon Supreme Court Justice.

In 1976, I ranked first in a statewide bar poll for appointment to the Oregon Supreme Court. Governor Robert Straub appointed Justice Hans Linde.

In 1979, I was among eight nominees selected by a merit selection commission for federal district court positions, and I was again ranked first in a statewide bar poll. Judges Panner, Redden, and Frye were appointed by President Carter.

17. Q: Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so the name of the judge, the court, and the dates of the period you were a clerk;

A: I did not serve as a law clerk.

2. whether you practiced alone, and if so, the addresses and dates;

A: Sole practioner October 1953 to March 1954. sharing office with Bert McCoy at 338 W. 11th, Eugene, Oregon.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

A: Deputy District Attorney for Lane County (Eugene, Oregon), March 1954 to January 1957.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

A: I had a small general practice for the six months after admission to the Oregon State Bar. Then I entered the District Attorney's office as a deputy.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

A: My clients had typical legal problems, such as domestic relations disputes, accusations crimes, and tax problems. I did not specialize in a particular area.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances varied, describe each such variance, giving dates.

A: While in private practice from October 1953 to March 1954, I appeared in court occasionally. As a deputy district attorney from March 1954 to January 1957, I appeared regularly.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

A: Federal courts -- 0%
State courts of record -- 50%
Other courts -- 50%

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

A: My private practice was approximately 50% civil and 50% criminal. As deputy district attorney, my practice was 100% criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

A: Sole counsel: 15 cases
Chief counsel: 2 cases
Associate counsel: about 10 cases.

5. What percentage of these trials was:
(a) jury;
(b) non-jury

A: Jury -- 100% non-jury -- none

18. Q: Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

A: In the intervening thirty years since I became a judge my recollection of cases I litigated has faded, and I have no records to refer to. I can recall only three significant cases, and a fourth case that was typical of litigation I handled as deputy district attorney. I do remember the opposing counsel in some of the cases I litigated and include their names and addresses.

1. State v. Park

trial period:	four days in April 1955
court:	Lane County Circuit Court
judge:	Circuit Judge William G. East
co-counsel:	F. Gordon Cottrell (now Circuit Judge) Lane County Courthouse 125 East 8th St. Eugene, Oregon 97401 (503) 687-4253
opposing counsel:	Clyde Johnson (deceased) William Huey (deceased)

I was the chief counsel for the prosecution of a Springfield city police officer for conversion of public funds. The case was tried to a jury, resulting in a guilty verdict and a four-year prison sentence.

As a consequence of this prosecution, there was a tremendous upheaval in Springfield city government; several council members were recalled and the chief of police resigned.

2. State ex rel Venn v. Reid, 207 Or. 617, 298 P.2d 990 (1956).

court:	Oregon Supreme Court
justices:	Justices Perry, Warner, Tooze, and Latourette in the majority; Justices Rossman, Lusk, and Brand dissenting
co-counsel:	District Attorney Eugene C. Venn (deceased)
opposing counsel:	E.B. Sahlstrom P.O. Box 10427 Eugene, Oregon 97440 (503) 687-1718 Clyde Johnson (deceased)

This case was an original proceeding in mandamus in the Oregon Supreme Court, seeking an order compelling a state circuit judge to discharge a grand jury that the plaintiff contended was illegally empaneled. As a deputy I was co-counsel with the District Attorney arguing the case before the Oregon Supreme Court. The result was a 4-3 decision sustaining a demurrer to the writ.

3. State v. Davis

court:	Lane County Circuit Court
judge:	Circuit Judge William G. East
co-counsel:	lead counsel on appeal was Joe B. Richards 300 Forum Building 777 High St. P.O. Box 10747 Eugene, Oregon (503) 484-9292
opposing counsel:	E.B. Sahlstrom P.O. Box 10427 Eugene, Oregon 97440 (503) 687-1718

This case was a manslaughter prosecution in which a demurrer to the indictment was sustained by the trial court. On appeal, the trial court was reversed by the Oregon Supreme Court. I drafted the indictment, handled the case in the trial court, and was on the brief on appeal. The case was significant because the Supreme Court defined the adequacy of an indictment charging misdemeanor-manslaughter.

4. State v. Wilford

trial period: two days
court: Lane County Circuit Court
judge: Circuit Judge William G. East
co-counsel: none
opposing counsel: Keith D. Skelton
The Law Corner
2207 N.E. Broadway
Portland, Oregon 97232
(503) 287-9802

This prosecution for burglary not in a dwelling resulted in a guilty verdict. It was typical of cases that I handled as a deputy district attorney.

Opposing counsel in cases I litigated:

Bert McCoy
338 W. 11th Avenue #100
Eugene, Oregon 97401
(503) 342-5541

Hale G. Thompson
100 Forum Building
777 High Street
Eugene, Oregon 97401
(503) 686-2100

Frank E. Bocci
1385 Oak Street
Eugene, Oregon 97401
(503) 399-9066

Herman P. Hendershott
733 Eugene Medical Center Building
132 E. Broadway
Eugene, Oregon 97401
(503) 343-7314

Windsor Calkins
1163 Olive Street
Eugene, Oregon 97401
(503) 345-0371

19. Q: Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

A: While serving as a magistrate and a district judge, I have served as what we call "settlement judge" in approximately 300 cases pending in this court, plus several others pending in state court. The rate of settlement has been very high.

For the last several years I have been forced to deny many requests to act in that capacity because of lack of available time.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Discribe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential confict of interest, including the procedure you will follow in determining these areas of concern.

   I would expect to continue to avoid potential conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. Have you ever held a major position, or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   1958-I was a candidate for and elected (unopposed) District Judge for Lane County, Oregon.

   1960-I was a candidate for and elected Circuit Judge for Lane County, Oregon

   1966 and 1972-I was a candidate for and re-elected (unopposed) Circuit Judge for Lane County, Oregon

   (Election of judges in Oregon is by non-partisan ballot.)

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   Attached

FINANCIAL STATEMENT

NET WORTH

EDWARD AND EILEEN LEAVY FEBRUARY 12, 1987

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	18	000	00
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	622	300	00
Real estate mortgages receivable			
Autos and other personal property	68	900	00
Cash value—life insurance	2	500	00
Other assets—itemize:			
Anticipated tax refund	23	600	00
Total assets	735	300	00

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured	3	800	00
Notes payable to relatives	25	000	00
Notes payable to others	117	000	00
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest	43	200	00
Real estate mortgages payable—add schedule	26	200	00
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	215	200	00
Net worth	520	100	00
Total liabilities and net worth	735	300	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	no		
Are you defendant in any suits or legal actions?	no		
Have you ever taken bankruptcy?	no		

ASSETS

Real Estate Owned- 193 acres of farm land at 22675 Butteville Rd. Aurora, Oregon valued at $505,000

Residence at 14375 S.W. 164th, Tigard, Oregon valued at $117,300.

LIABILITIES

Real estate mortgage on residence to Benj. Franklin $26,200

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution:

I think the criticism is well founded. I see judicial power as the authority to hear and decide cases or controversies within the adversary system. Just as the U.S. Government is of limited power, so are its courts.

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals:

Class action litigation under Fed. R. Civ. P. 23 is part of the make-up of our civil procedure. The rule can serve a useful purpose within its own limits. It should be used only as a tool of efficiency and economy. I think the criticism should be aimed at the over use of class action procedure rather than simply a criticism of its existence.

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

I think the criticism is valid. The courts have no taxing authority and no authority to appropriate funds. We should always be mindful of equal rights and equal access to justice but the undertaking of new governmental duties should be left to the legislative and administrative process. Those branches are better equipped to listen to the will of the people as a whole.

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

As a criticism of the judiciary alone I do not think it is warranted. Legislative action as well as judicial decision has loosened the requirements. To the extent that government is increasingly using agencies with power to administer such a large portion of the nation's wealth we will find an ever increasing circle of persons who feel and who may very well be adversely affected by governmental action.

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I think the criticism is valid. The court should end its role in litigation as rapidly as possible. It should try to make its final orders clear and avoid, if at all possible, retaining jurisdiction to administer its remedies.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

In the past 30 years as a judge or magistrate in four courts as well as having been a Justice Pro Tem of the Oregon Supreme Court, and those occasions when I have sat by designation on the Ninth Circuit Court of Appeals, I have heard and decided traffic, small claim, collection, landlord tenant, mental commitment, guardianship, decedent estate, adoption, divorce, juvenile, zoning, personal injury, felony, misdemeanor, foreclosure, civil rights, patent, admirality, election validity, tax, tort claim, social security, as well as other cases representing what I think is the full range of issues seen by courts anywhere within the State of Oregon. I believe I have been equally concerned at every level with deciding cases justly under the law.

I have had authority during those years to hire staff including secretaries, law clerks, reporters and bailiffs. I have hired some young, some old, some male, some female, some white and some non-white. I do not think I have been influenced by anything other than skill.

I helped start the Marist High School Foundation. One of its purposes was to aid students to pay tuition to Marist, which is a private school. The goal was to include students from families of low income. The charter of the foundation which I helped obtain included a provision that aid would be administered without regard to race or religion.

I accepted appointments to defend accused defendants in criminal cases.

ATTACHMENT PER QUESTION 15(2)

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                          COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                      Rank(R)          Page(P)          Database   Mode
800 F.2d 1498                 R 1 OF 4         P 1 OF 51        CTA9        T
  1986-2 Trade Cases P 67,299
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Timothy A. PATRICK, M.D., Plaintiff-Appellee,
v.
William M. BURGET, M.D., Jorma M. Leinassar, M.D., R.G. Kettlekamp, M.D., Patrick Meyer, M.D., Gary Boelling, M.D., Robert D. Neikes, M.D., Franklin D. Russell, M.D., Leigh C. Dolin, M.D., Richard C. Harris, M.D., Daniel M. Rappaport, M.D., and Tzu Sung Chiang, M.D. doing business as Astoria Clinic, Defendants-Appellants.
Nos. 85-3759, 85-4071.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 4, 1986.
Decided Sept. 30, 1986.

Doctor brought action against doctors who were partners in medical clinic for violations of Sherman Act and for interference with prospective economic advantage under Oregon law. The United States District Court for the District of Oregon, Edward Leavy, J., awarded judgment on jury verdict against some of the defendant doctors and clinic on Sherman Act claims and awarded damages against some of the doctors on state law claim, and doctors appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) state action doctrine exempted from federal antitrust liability medical peer review-associated activities; (2) failure to instruct as to various state law immunities was error, for purposes of state law claim; and (3) judgments against defendant doctors on state law claim would be reversed and remanded for new trial based on failure to instruct.

Reversed and remanded.

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                          COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                      Rank(R)          Page(P)          Database   Mode
785 F.2d 1455                 R 2 OF 4         P 1 OF 8         CTA9        T
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Robert S. HAYES, Plaintiff-Appellant,
v.
Margaret M. HECKLER, Secretary of Health and Human Services, Defendant-Appellee.
No. 85-3879.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 4, 1986.
Decided April 4, 1986.

Successful social security disability claimant filed motion and petition for attorney fees under Equal Access to Justice Act. The United States District Court for the District of Oregon, Edward Leavy, J., denied the motion on the ground that the position of Secretary of Health and Human Services during the dispute was substantially justified. Claimant appealed. The Court of Appeals held that the Court could not review the district court's denial of the petition, where the district court had given no explanation of the basis for its decision that the position of the Secretary of Health and Human Services was "substantially justified."

Vacated and remanded.

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                          COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                      Rank(R)          Page(P)          Database   Mode
781 F.2d 758                  R 3 OF 4         P 1 OF 26        CTA9        T
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Donald G. JOHNSON, Petitioner-Appellant,
v.
Alan A. STAGNER, Warden, Respondent-Appellee.
No. 85-3530.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Sept. 5, 1985.
Decided Jan. 28, 1986.

State prisoner sought writ of habeas corpus alleging violation of Interstate Agreement on Detainers. The United States District Court for the District of Oregon, Edward Leavy, J., denied petition, and prisoner appealed. The Court of Appeals, Fletcher, Circuit Judge, held that remand was necessary for determination of whether continuation of trial was granted for good cause in open court with prisoner or his counsel present, as required by agreement, or if prisoner explicitly stipulated to continuance or explicitly waived his right to trial with 180 days.

Remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
763 F.2d 376	R 4 OF 4	P 1 OF 12	CTA9	T

UNITED STATES of America, Plaintiff-Appellant,
v.
Joseph K. HATTRUP and Robert H. Hattrup, Defendants-Appellees.
No. 84-3090.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 6, 1985.
Decided June 14, 1985.

The Government appealed from an order of the United States District Court for the District of Oregon, Edward Leavy, J., dismissing a multicount indictment with prejudice under Federal Criminal Rule 48(b). The Court of Appeals, Kennedy, Circuit Judge, held that discretion was abused in dismissing the indictment with prejudice after prosecutor's sole witness failed to appear, where Government's motion for continuance on day of trial was its first such motion, all other delays in bringing case to trial were attributable to defense motions, Government's sincerity in asserting that witness was essential to its case was never doubted, neither defendants nor district judge ever suggested that prosecutor sought continuance to harass defendants or to gain tactical advantage, facts leading to witness' absence carried no suggestion of prosecutorial negligence, and record did not suggest that continuance would have resulted in prejudice or threat of prejudice to defendants.

Reversed and remanded.

Norris, Circuit Judge, dissented and filed opinion.

Citation	Rank(R)	Page(P)	Database	Mode
569 P.2d 609. 280 Or. 45	R 1 OF 35	P 1 OF 15	OR-CS	T

Lynn WILSON and Sharon Wilson, husband and wife, Appellants.
v.
WILLAMETTE INDUSTRIES, INC., an Oregon Corporation, dba Dallas Lumber & Supply Company, Respondent.
Supreme Court of Oregon, Dept. No. 1.
Argued and Submitted June 8, 1977.
Decided Oct. 4, 1977.

Suit to quiet title was brought by purchasers of real property under an unrecorded deed. The Circuit Court, Lane County, Edward Leavy, J., entered decree adverse to plaintiffs, and plaintiffs appealed. The Supreme Court, Tongue, J., held that judgment creditor could not subject property of innocent purchasers for value to lien of a judgment against a debtor who had previously conveyed all of his interest in the property to such purchasers by way of an unrecorded deed.

Reversed and remanded.

Citation	Rank(R)	Page(P)	Database	Mode
563 P.2d 164 278 Or. 21	R 2 OF 35	P 1 OF 18	OR-CS	T

278 Or. 21 OAKRIDGE COMMUNITY AMBULANCE SERVICE, INC., a nonprofit corporation, Appellant,
v.
UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, Respondent.
Supreme Court of Oregon, In Banc.
Argued and Submitted March 7, 1977.
Decided April 19, 1977.

Insured ambulance service brought action against its automobile liability carrier to recover expenses and reasonable attorney fees incurred in successfully defending a wrongful death action the defense of which had been tendered to the insurer but refused. The Circuit Court, Lane County, Edward Leavy, J., sustained the insurer's demurrer and entered judgment for the insurer. The ambulance service appealed, and the Supreme Court, Holman, J., held that because the complaint in the wrongful death action against the insured ambulance service was sufficiently broad to permit the introduction of evidence that insured's alleged fialure to respond to the scene of the accident within a reasonable time was due to negligence in the manner in which the ambulance was maintained or operated, the complaint could have resulted in the imposition of liability for conduct covered by the applicable automobile liability policy and, therefore, insured's complaint against the insurer for expenses incurred by the insured as a result of the insurer's refusal to defend stated a cause of action.

Reversed and remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation Rank(R) Page(P) Database Mode
552 P.2d 1320 R 3 OF 35 P 1 OF 8 OR-CS T
26 Or.App. 471

STATE of Oregon, Respondent.
v.
Carolyn A. PETERSON, Appellant.
Court of Appeals of Oregon.
Argued and Submitted July 19, 1976.
Decided Aug. 16, 1976.

Defendant appealed from her conviction in Circuit Court, Lane County, Edward Leavy, J., of criminal conspiracy and fraudulent use of credit card. The Court of Appeals, Schwab, C.J., held that evidence was sufficient to support conviction on each count, that trial court's failure to give instruction which was not requested by defendant was not 'manifest error,' and that conviction should only have been entered against defendant on one count, to be elected by State, since defendant could not be convicted both of conspiracy to commit offense and of offense itself.

Remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation Rank(R) Page(P) Database Mode
550 P.2d 1185 R 4 OF 35 P 1 OF 41 OR-CS T
275 Or. 97

STATE FARM FIRE AND CASUALTY COMPANY et al., Respondents.
v.
CENTURY HOME COMPONENTS, INC., a corporation, Appellant.
Supreme Court of Oregon.
Argued and Submitted Jan. 6, 1976.
Decided May 27, 1976.

After a fire started on the premises of a manufacturer of prefabricated housing and spread to surrounding buildings, destroying various property stored in a nearby warehouse and after several owners of the property thus destroyed brought actions against the manufacturer, in which the manufacturer procured one favorable judgment and two jury verdicts and the claimants received two judgments, 13 additional claimants brought suit to recover for damage to their property resulting from the same fire. The Circuit Court, Lane County, Douglas R. Spencer, Don H. Sanders, F. Gordon Cottrell, Helen J. Frye and Edward Leavy, JJ., ruled that the manufacturer was collaterally estopped from contesting liability, and the manufacturer appealed. The Supreme Court, Holman, J., held that because of the basic inconsistency of the prior determinations, it would be basically unfair to preclude the manufacturer from relitigating the issue of liability.

Reversed and remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation Rank(R) Page(P) Database Mode
539 P.2d 166, R 7 OF 35 P 1 OF 10 OR-CS T
22 Or.App. 344

STATE of Oregon, Respondent.
v.
Carl Edward OLSON, Appellant.
Court of Appeals of Oregon.
Argued and Submitted July 21, 1975.
Decided Aug. 25, 1975.

Defendant appealed from an order of the Circuit Court, Lane County, Edward Leavy, J., which overruled defendant's objections to a prior order incorporating a 'cost bill' filed by State following defendant's conviction on a plea of guilty to offense of forgery in second degree. The Court of Appeals, Langtry, J., held that defendant's appeal from imposition of special costs in criminal case could be considered on merits involving matters pertaining to sentence and defendant was not required to pursue his remedies through the postconviction procedures; and that court was without jurisdiction to amend sentence by subsequently imposing special costs itemized by State.

Reversed.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
537 P.2d 1151 22 Or.App. 161	R 8 OF 35	P 1 OF 12	OR-CS	T

STATE of Oregon, Appellant,
v.
Noe Cecil McINTIRE, Respondent.
Court of Appeals of Oregon.
Submitted on Record and Appellant's Brief June 18, 1975.
Decided July 21, 1975.

Defendant was convicted before the district court of carrying a concealed revolver, and he appealed. The Circuit Court, Lane County, Edward Leavy, J., sustained defendant's demurrer and dismissed complaint, and State appealed. The Court of Appeals, Langtry, J., held that statutory provision pertaining to penalty for such offense was superseded by subsequently enacted statute also relating to penalty for such offense and that complaint did not have to contain the negative exception 'without having a license to carry such firearm.'

Reversed.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
533 P.2d 825 21 Or.App. 7	R 10 OF 35	P 1 OF 21	OR-CS	T

WESTERN AMUSEMENT COMPANY, INC., a California Corporation, Respondent,
v.
CITY OF SPRINGFIELD, a Municipal Corporation, Appellant.
Court of Appeals of Oregon.
Argued and Submitted Feb. 20, 1975.
Decided April 7, 1975.

Writ of review proceeding was filed to reverse and annul action of city in assessing property owner with a proportionate share of cost of improving an abutting street. The Circuit Court, Lane County, Edward Leavy, J., sustained owner's objections and declared assessment null and void, and city appealed. The Court of Appeals, Thornton, J., held that action of city in determining that owner's property was benefited, requiring owner to pay its proportionate share of cost of improvement, and refusing to assess subdivider with entire cost thereof was not palpably arbitrary and abusive and did not deprive owner of due process or equal protection.

Reversed.

Schwab, C.J., concurred specially and filed opinion.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
524 P.2d 1238 18 Or.App. 273	R 11 OF 35	P 1 OF 10	OR-CS	T

Darline R. HOCKEMA, Respondent,
v.
Lloyd S. HOCKEMA, Appellant.
Court of Appeals of Oregon.
Argued and Submitted July 17, 1974.
Decided July 29, 1974.

Motion by husband for modification of the support provisions of a divorce decree. The Circuit Court, Wayne County, Edward Leavy, J., denied the motion, and husband appealed. The Court of Appeals, Tanzer, J., held that where husband's per month net income had decreased from $1,200 to $760, child support and alimony provisions should be modified from $500 to $400 per month.

Reversed and remanded.

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                        COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                  Rank(R)          Page(P)          Database    Mode
516 P.2d 1293.            R 14 OF 35       P 1 OF 17        OR-CS        T
 267 Or. 321
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Dean MADDOX, dba Mid-Valley Striping Service, Respondent.
v.
BALBOA RACEWAYS, INCORPORATED, a corporation, and Edward M. Anderson, Appellants.
Supreme Court of Oregon, In Banc.
Argued and Submitted Nov. 5, 1973.
Decided Dec. 13, 1973.

Contractor brought action to enforce mechanic's lien against tenant and landlord. The Circuit Court, Lane County, Edward Leavy, J., entered judgment in favor of contractor and landlord appealed. The Supreme Court, Tongue, J., held that contractor who furnished work at direction of the tenant was not an original contractor with respect to the landlord and thus could not take advantage of longer period for filing of mechanic's lien; that statute which provided that improvements made upon the land with the knowledge of the owner would be deemed constructed at the instance of such owner merely provided method for determining who was required to post notice of nonresponsibility and did not create a contractual relationship between such owner and the contractor, such as would allow contractor to take advantage of longer period for filing lien against owner.

Reversed and remanded.

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                        COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                  Rank(R)          Page(P)          Database    Mode
513 P.2d 1140.            R 16 OF 35       P 1 OF 40        OR-CS        T
 266 Or. 666
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Donald F. PLOURD, Respondent.
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation, Appellant.
Supreme Court of Oregon.
Argued and Submitted June 1, 1973.
Decided Sept. 10, 1973.

Action for personal injuries sustained by plaintiff on freight train while employed as a brakeman for defendant railroad. The Circuit Court, Lane County, Edward Leavy, J., entered verdict on judgment for plaintiff, and defendant appealed. The Supreme Court, Tongue, J., held that The Supreme Court, Tongue, J., held that it was both improper and prejudicial to refuse to withdraw specifications relating to a broken air hose chain when there was no evidence whatsoever that a broken air hose had anything to do with sudden and unexpected 'slack action' which threw brakeman to floor, that trial court erred in failing to instruct jury that any award for loss of future wages must be on basis of present value of such benefits, but that trial court did not err in permitting plaintiff's expert witness to assume continued future increases in wage rates for purpose of computing present value of proposed award for loss of future wages, nor in excluding railroad's evidence that it would offer clerica employment to brakeman. It was further held by a majority of the court in a concurring opinion by Holman, J., that the trial court erred in admitting a computation of the hypothetical loss of future wages for another brakeman with comparable seniority.

Judgment set aisde and case remanded for new trial.

Holman, J., concurred in result and filed opinion, and Denecke, Howell and Bryson, J., joined in concurrence.

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                        COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                  Rank(R)          Page(P)          Database    Mode
522 P.2d 499.             R 12 OF 35       P 1 OF 14        OR-CS        T
 17 Or.App. 499
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STATE of Oregon, Respondent.
v.
Robert Andrew TAYLOR, Appellant.
Court of Appeals of Oregon.
Argued and Submitted April 16, 1974.
Decided May 28, 1974.

Defendant was convicted in the Circuit Court, Lane County, Edward Leavy, J., of second-degree burglary and he appealed. The Court of Appeals, Schwab, C.J., held that, when a person enters or remains in an area that, at the time he enters or remains, is open to the public, the act of entering or remaining is not unlawful and cannot be the basis of a burglary charge; and that evidence that laundry room which defendant entered at 4 a.m. and in which he was apprehended after removing coins from laundry machines, was not locked, evidence that lights were shining outside the apartment building, and evidence that there was no sign outside the laundry facility indicating that it was limited to private use entitled defendant to an instruction on the lesser included offense of second-degree theft.

Reversed and remanded.

Fort, J., dissented and filed an opinion.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

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Citation              Rank(R)         Page(P)       Database   Mode
518 P.2d 177,         R 13 OF 35      P 1 OF 13     OR-CS      T
 16 Or.App. 310
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STATE of Oregon, Respondent,
v.
Bruce Gregory BISHOP, Appellant.
Court of Appeals of Oregon.
Argued and Submitted Dec. 20, 1973.
Decided Jan. 28, 1974.

Defendant was charged with first-degree theft. He was convicted in the Circuit Court, Lane County, Edward Leavy, J., of second-degree theft and he appealed. The Court of Appeals, Schwab, C.J., held that where there was no evidence concerning the distance between the two libraries from which defendant was alleged to have stolen books and where there was no evidence as to when the books were taken, the charges were not closely enough linked in time, place and circumstances to be tried together over defendant's objection.

Reversed and remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

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Citation              Rank(R)         Page(P)       Database   Mode
501 P.2d 1005,        R 17 OF 35      P 1 OF 5      OR-CS      T
 11 Or.App. 75
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STATE of Oregon, Appellant,
v.
Armando R. LaGUARDIA, Respondent.
Court of Appeals of Oregon.
Argued and Submitted Aug. 24, 1972.
Decided Oct. 12, 1972.

Defendant was charged with criminal activity in drugs by knowingly and unlawfully possessing marihuana. The Circuit Court, Lane County, Edward Leavy, J., dismissed indictment, and State appealed. The Court of Appeals, Foley, J., held that where same information, which was filed in District Court and which charged that defendant had committed offense of criminal activity in drugs by knowingly and unlawfully possessing marihuana, contained endorsement designating the offense as 'Class B Felony,' information charged a felony within intendment of statute providing that an order for dismissal of charge or action is bar to another prosecution for same crime if crime is misdemeanor but is not a bar if crime charged is a felony.

Reversed and remanded.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

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Citation              Rank(R)         Page(P)       Database   Mode
497 P.2d 666          R 18 OF 35      P 1 OF 5      OR-CS      T
 262 Or. 500
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James T. JOHNSON et al., Respondents,
v.
Mathilda H. CAMPBELL, aka Tillie Simmons, et al., Appellants,
Cascade Title Company, an Oregon corporation, Defendant.
Supreme Court of Oregon, In Banc.
Argued and Submitted May 8, 1972.
Decided May 24, 1972.

Suit for declaratory decree interpretating land sale contract. The Circuit Court, Lane County, Edward Leavy, J., rendered judgment and an appeal was taken. The Supreme Court, 487 P.2d 69, reversed and remanded with direction, the Circuit Court entered a decree, and defendants appealed. The Supreme Court, O'Connell, C.J., held that declaratory decree stood as it was entered in all respects other than scope of restrictive covenant, where there was no appeal on ground other than scope of restriction, and other issues still alive and not barred by res judicata could be raised only by another suit or action.

Remanded with directions.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
491 P.2d 992. 260 Or. 513	R 20 OF 35	P 1 OF 23	OR-CS	T

Clarence E. BRENNEMAN and Karl Ray Barnes, Respondents,
v.
AUTO-TERIA, INC., a corporation, Appellant.
Supreme Court of Oregon.
Argued and Submitted July 9, 1971.
Decided Dec. 15, 1971.

Buyers brought action against seller for breach of warranty and of contract for sale of automatic carwash unit. The Circuit Court, Lane County, Edward Leavy, J., granted buyers' motion for new trial following verdict in favor of seller and the seller appealed. The Supreme Court, McAllister, J., held that where carwash business was not an established business with a record of past profits but was an entirely new venture, two self-service carwash units which had been supplied by seller operated at loss while owned by buyers and nothing in record indicated that if automatic unit had worked, carwash business would have been a profitable operation, buyers failed to prove any basis upon which jury could have awarded lost operating profits.

Reversed.

Citation	Rank(R)	Page(P)	Database	Mode
491 P.2d 1023. 261 Or. 333	R 21 OF 35	P 1 OF 28	OR-CS	T

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, a Washington corporation, et al., Appellants,
v.
CENTURY HOME COMPONENTS, INC., a corporation, and Wood Components Co., a corporation, Respondents.
Supreme Court of Oregon.
Argued and Submitted June 7, 1971.
Decided Dec. 15, 1971.

Plaintiff brought action to recover for property which was destroyed by fire allegedly caused by defendants in the operation of their wood manufacturing plant. A jury in the Circuit Court, Lane County, Edward Leavy, J., returned verdict in favor of defendants, and plaintiff appealed. The Supreme Court, Denecke, J., held, inter alia, that where one of defendants' principal defenses was that the fire had been started by three boys, and where defense witness testified that woman had signed a statement to the effect that her brother, one of the three boys, had admitted starting the fire, trial court's refusal to compel production of the statement for the purpose of possible impeachment of the witness was prejudicial error.

Reversed and remanded with instructions.

Citation	Rank(R)	Page(P)	Database	Mode
487 P.2d 69 259 Or. 444	R 22 OF 35	P 1 OF 10	OR-CS	T

James T. JOHNSON and Elizabeth J. Johnson, husband and wife et al., Appellants,
v.
Mathilda H. CAMPBELL, aka Tillie Simmons et al., Respondents.
Supreme Court of Oregon, In Banc.
Argued and Submitted June 3, 1971.
Decided July 23, 1971.

Suit for declaratory decree interpreting land sale contract entered into between plaintiffs as purchasers and defendants as vendors. The Circuit Court, Lane County, Edward Leavy, J., rendered judgment and plaintiffs appealed. The Supreme Court, O'Connell, C.J., held that a restriction in a deed will not be enlarged or extended by construction or implication beyond clear meaning of its terms.

Reversed and remanded with directions.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
485 P.2d 18 258 Or. 632, 53 A.L.R.3d 1276	R 23 OF 35	P 1 OF 28	OR-CS	T

Jane L. WIENER, Appellant,
v.
GAMMA PHI CHAPTER OF ALPHA TAU OMEGA FRATERNITY, an Oregon Corporation, et al., Respondents.
Supreme Court of Oregon, In Banc.
Argued and submitted March 5, 1970.
Reargued April 5, 1971.
Decided May 19, 1971.

Action for injuries resulting from automobile accident brought against owners and operators of ranch, at which driver of automobile was given alcoholic beverages, and others. The Circuit Court, Lane County, Edward Leavy, J., allowed motion to quash service of summons as to one defendant and sustained demurrers filed by other defendants and plaintiff appealed. The Supreme Court, O'Connell, C.J., held that, in absence of showing that person who delivered alcoholic beverages to ranch had any control over their dispensation at party, such person was not liable for injuries suffered allegedly as result of alcohol being furnished to minor guest who drove automobile at time of accident in which plaintiff was injured. The Court held, however, that the complaint stated cause of action against fraternity on theory that it ought to have know that guest was a minor and that he would be driving after party so that its serving alcohol to the guest was unreasonable.

Judgment affirmed in part and reversed in part and appeal from order quashing service dismissed.

McAllister, J., concurred in part and dissented in part and filed an opinion in which Bryson, J., joined.

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                      COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                Rank(R)        Page(P)        Database    Mode
465 P.2d 880            R 24 OF 35     P 1 OF 13      OR-CS       T
 255 Or. 289
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K. D. GILBERT, an individual and K. D. Gilbert, an Oregon corporation,
Respondents.
v.
CITY OF EUGENE, a municipal corporation of the State of Oregon, Appellant.
Supreme Court of Oregon, In Banc.
Argued and Submitted Jan. 7, 1970.
Decided March 11, 1970.

Proceeding by corporate and individual owners of real property to set aside special sewer assesments levied by city. The Circuit Court, Lane County, Edward Leavy, J., voided the challenged assessments, and city appealed. The Supreme Court, Sloan, J., held that there was evidence of some benefit to landowner who had been assessed for sewer line along street, by city's action in building sewer in easement granted by landowner across his property from street to a highway and assessing property adjoining easement for cost of sewer, and there was no evidence to overcome a weighty presumption that action of city council in fixing assessment district and apportioning the cost within such district was correct, notwithstanding landowners' claim that sewer line along street provided all sewer requirements that could possibly be used.

Reversed.

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                      COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                Rank(R)        Page(P)        Database    Mode
465 P.2d 699            R 25 OF 35     P 1 OF 9       OR-CS       T
 255 Or. 186
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Benjamin METCALF, Appellant,
v.
W. R. ROESSEL, Ted Roessel, and George A. Collins, a partnership doing
business under the firm name of C. R. and K. Logging Company, Respondent.
Supreme Court of Oregon, In Banc.
Argued and Submitted Sept. 9, 1969.
Decided Feb. 27, 1970.

Action by truck driver against an employer other than his own to recover under Employers' Liability Act for injuries sustained in course of employment. The Circuit Court, Lane County, Edward Leavy, J., entered judgment in favor of employer and driver appealed. The Supreme Court, Holman, J., held that logging contractor whose foreman at loading site habitually directed truck drivers to pull away from site after trucks were loaded and only one or two binder chains had been put on load and which was aware of fact that drivers customarily stopped at turnout in road approximately 350 feet from site to put on additional necessary binder chains had sufficient control over work of driver employed by subcontractor at time driver was injured by falling tree which struck cab of his truck while he was traversing distance from site to turnout to render it liable for driver's injuries, under Act.

Reversed and remanded.

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                      COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation                Rank(R)        Page(P)        Database    Mode
451 P.2d 456.           R 29 OF 35     P 1 OF 31      OR-CS       T
 253 Or. 376
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Peggy J. BAXTER, formerly Peggy J. Riley, Respondent,
v.
Edwin M. BAKER and Patricia Baker, Appellants.
Supreme Court of Oregon, In Banc.
Argued before Department 2 and Submitted June 7, 1968.
Reargued Nov. 13, 1968.
Decided March 12, 1969.
Rehearing Denied May 21, 1969.

Personal injury case, wherein the Circuit Court of Lane County, Edward Leavy, J., rendered judgment for plaintiff and defendants appealed. The Supreme Court, Goodwin, J., held that a plaintiff who was not earning wages at time of injury is not entitled to instruction on special damages, and hence instruction singling out lost wages as 'special damages' was improper where evidence proved merely a loss of earning capacity, compensable under instruction for general damages.

Reversed and remanded.

O'Connell, Denecke and Sloan, JJ., dissented.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
451 P.2d 471, 252 Or. 597	R 30 OF 35	P 1 OF 18	OR-CS	T

STATE of Oregon, Appellant,
v.
Melvin Ernest TUCKER, Respondent.
Supreme Court of Oregon, Department 1.
Argued and Submitted Dec. 4, 1968.
Decided March 12, 1969.

Prosecution for failure to provide support for defendant's minor children. The Circuit Court, Lane County, Edward Leavy, J., sustained defendant's demurrer to indictment, and state appealed. The Supreme Court, Langtry, J. pro tem., held that indictment which alleged three counts, each for failure to support one of defendant's children, did not charge more than one nonfeasance or more than one crime but rather properly charged multiple counts, and that question whether, where there were several members of one family living together under same circumstances, father obligated to support them could be charged with failure to support as to each member of family group was prematurely raised by demurrer to indictment prior to admission of any evidence.

Order reversed, and case remanded for proceedings consistent with opinion.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
439 P.2d 11 249 Or. 465	R 32 OF 35	P 1 OF 7	OR-CS	T

Dorothy JOHNSON, Respondent,
v.
Solomon REXIUS, Raymond L. Rexius, Marvin L. Rexius, Lilian F. Rexius, and
June Rexius Sutton, partners, dba Rexius Fuel Service, Appellants.
Supreme Court of Oregon, Department No. 1.
Argued and Submitted March 8, 1968.
Decided March 27, 1968.

Action for damages arising out of collision of plaintiff's automobile with ~~defendant's~~ left turning truck. The Circuit Court Lane County, Edward Leavy, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Holman, J., held that evidence raised jury question as to contributory negligence of plaintiff in failing to see truck's left turn signals and to note that truck was slowing its speed and in not reducing speed and controlling automobile sufficiently to avoid collision.

Reversed and remanded for new trial.

COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS

Citation	Rank(R)	Page(P)	Database	Mode
437 P.2d 836 249 Or. 367	R 33 OF 35	P 1 OF 30	OR-CS	T

Jeanne Marie WING, Executrix of the Estate of Edna E. DeNeffe, Deceased, and
Sylvanus Smith, Appellants,
v.
CITY OF EUGENE, a Municipal Corporation of the State of Oregon, Respondent.
Supreme Court of Oregon, In Banc.
Argued and Submitted Feb. 5, 1968.
Decided Feb. 28, 1968.

Appeal from order of the Circuit Court of Lane County, Edward Leavy, J., dismissing writs of review. The Supreme Court, Langtry, J. pro tem., held, inter alia, that downward reassessment of particular property, with consequence that special assessments against other properties were increased, was invalid since other property owners were not served with new procedural notices specifying time and place for hearing on objections.

Affirmed in part; reversed in part.

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                  COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation             Rank(R)          Page(P)          Database    Mode
425 P.2d 496         R 34 OF 35       P 1 OF 13        OR-CS        T
 246 Or. 449
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Margaret JOHNSON and Merle N. Johnson, Respondents,
v.
STATE COMPENSATION DEPARTMENT of the State of Oregon, Appellant.
Supreme Court of Oregon, Department 2.
Argued and Submitted March 9, 1967.
Decided March 29, 1967.

Workmen's compensation case. Upon denial of claims by Commission, on ground that they were not timely filed, claimants appealed. The Circuit Court, Lane County, Edward Leavy, J., found for claimants and appeal was taken. The Supreme Court, Denecke, J., held that where claimants had been hospitalized during first three months after accident and were mentally and physically incapacitated during that period, there was sufficient cause shown for their failure to file application within rule providing that no application shall be valid unless claim is filed within three months after date of accident, but Commission may, upon sufficient showing, permit filing of claim within one year of time accident occurred, but that showing of excuse for failure to file within three months did not relieve them of obligation of showing cause for delay in filing application within the remaining nine-month period in which claim could be filed.

Reversed and remanded for determination of issue whether plaintiffs made sufficient showing to excuse their failure to file their claims prior to date filed.

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                  COPR. (C) WEST 1987 NO CLAIM TO ORIG. U.S. GOVT. WORKS
Citation             Rank(R)          Page(P)          Database    Mode
396 P.2d 558         R 35 OF 35       P 1 OF 23        OR-CS        T
 239 Or. 200
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STATE of Oregon, Respondent,
v.
Kenneth Richard D. ANDERSON, Appellant.
Supreme Court of Oregon, In Banc.
Argued and Submitted Sept. 10, 1964.
Decided Nov. 4, 1964.

Prosecution for assault with intent to rob while armed with a dangerous weapon. From a conviction in the Circuit Court, Lane County, Edward Leavy, J., defendant appealed. The Supreme Court, Goodwin, J., held that the defect, if any, in the marriage ceremony in which assent of defendant was given by proxy was not a defect that would render the marriage void, but merely voidable, and defendant was erroneously refused the right to invoke the husband-wife privilege to exclude his spouse's testimony.

Reversed and remanded.

McAllister, C. J., and Perry and Rossman, JJ., dissented.

Recd. 2/6/87 eg.

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: EDWARD LEAVY
United States Court of Appeals
for the Ninth Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Edward Leavy for appointment as Judge of the United States Court of Appeals for the Ninth Circuit.

A substantial majority of our Committee is of the opinion that Judge Leavy is "Exceptionally Well Qualified" for this appointment. The minority found him to be "Well Qualified."

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

MALCOLM F. MARSH

Birth:	September 24, 1928	Portland, Oregon
Legal Residence:	Oregon	
Marital Status:	Married	Sharon Long Marsh 3 children
Education:	1948 - 1951	University of Oregon B.S. degree (1952)
	1951 - 1954	University of Oregon School of Law LL.B. degree
Bar:	1954	Oregon
Military Service:	1946 - 1947	United States Army Corporal
Experience:	1954 - 1958	Marsh, Marsh & Dashney Associate
	1958 - present	Clark, Marsh, Lindauer & McClinton Partner (firm has had various other names)
Office:	880 Liberty Street NE P.O. Box 2206 Salem, Oregon 97308-2206 503 581-1542	
Home:		

To be United States District Judge for the District of Oregon

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Malcolm Francis Marsh

2. Address: List current place of residence and office address(es).

   Residence: 2525 Birds Hill Drive South
   Salem, Oregon 97302

   Office: 880 Liberty Street NE
   Salem, Oregon 97301

3. Date and place of birth.

   September 24, 1928 Portland, Oregon

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Sharon (nmn) Long Marsh
   Housewife

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   University of Oregon 9/48 to 6/51
   Degree: B.S. (Law) 6/52
   University of Oregon School of Law 9/51 to 6/54
   Degree: LLB 6/13/54
   On 9/25/71 the LLB degree was substituted by the granting of a J.D. Degree

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizatons, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

A. Professonal Employment:

1954-58 Marsh, Marsh & Dashney
212 High Street NE
Salem Oregon
Associate
(Branch of Marsh, Marsh & Dashney
525 East Fourth Street
McMinnville OR 97128)

Since 1958 to present I have been a partner in one firm which has grown over the years with the following name changes.

1958-59 Clark & Marsh
210 Pioneer Trust Building
Salem Oregon
Partner

1959-64 Goodenough, Clark & Marsh
210 Pioneer Trust Building
Salem Oregon
Partner

1964-71 Clark & Marsh
410 Capitol Tower
Salem Oregon
Partner

1971-75 Clark, Marsh & Lindauer
410 Capitol Tower
Salem Oregon
Partner

1975-80 Clark, Marsh & Lindauer
(Mr. McClinton was made a partner at this time, but the firm name was not changed)
880 Liberty Street NE
Salem Oregon
Partner

1980-84 Clark, Marsh, Lindauer, McClinton & Vollmar
880 Liberty Street NE
Salem, Oregon
Partner

1984 present Clark, Marsh, Lindauer & McClinton
880 Liberty Street NE
PO Box 2206
Salem OR 97308-2206
Partner

I practiced law in the firm under a professional corporation known as Malcolm F. Marsh, P.C. from 8/20/80 to 1/30/86.

B. Non-Professional Business Enterprises:

1. 1958-63 Pran Corp. - Real estate investment club. Sold in 1963.

2. 1965-75 Quisenberry-Marsh. Real estate investment partnership. Sold in 1975.

3. 1966-Present
Quisenberry-Lyman-Marsh. Co-ownership of 70 acres of undeveloped real property.

4. 1966-Present
Cushing-Marsh Shadden Trust. I hold a 1/10th ownership in a trust which owns the vendors' interest in two land sale contracts. These contracts will be paid off March 1, 1989. I also serve as Trustee of this trust.

5. 1976-present
Clark, Marsh, Lindauer & McClinton Building Partnership. This partnershp owns the office building leased to the law partnership.

C. Non-business Enterprise.

(1) 1973-Present
I own 2/5th interest in Dabob Bay Beach Club. This is a vacation home located at Brinnen, Washington.

(2) 1970-75 (approximately)
I owned a 1/10th interest in a duck club used for hunting and recreation. Sold approximately 1975.

(3) 1968-75 Board Member of Salem Area Chamber of Commerce.

(4) 1973-86 Board member of Western Security Bank. Resigned March 31, 1986.

(5) 1982-86 Board member of Western Security Financial Corp. Holding company for Western Security Bank. Resigned March

31, 1986.

(6) 1979-Present
Member of Board of Trustees of Salem Hospital. A community non-profit hospital.

(7) 1982-Present
Board member of Pacific Health Horizons. Holding company of Salem Hospital.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes. United States Army, September 16, 1946 to December 17, 1947
Serial No. RA 19276749
Corporal
Honorable Discharge, December 17, 1947.

8. Honors & Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Honor Roll all nine terms of Law School
Note & Comment Editor, Oregon Law Review, 1953-54

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Professional Organizations:

Marion County Bar Association (Board of Directors, early 1960)
Multnomah County Bar Association
Oregon State Bar Association
American Bar Association
Oregon Association of Defense Counsel
  (Executive Committee, 1978-81, President 1981)
Fellow, American College of Trial Lawyers
  (State Chairman 1985-86)
Fellow, Oregon Law Foundation
Federation of Insurance Counsel
Defense Research Institute

Continuing Legal Education Committee, OSB
  (Oregon State Bar Association)
  2 terms; Chairman 1968 Session on Federal Procedure
Disciplinary Rules & Procedure Committee, OSB
Procedure and Practice Committee, OSB
Uniform Jury Instructions Committee, OSB
Clackamas, Marion & Linn County Local Professional Responsibility Committee (previously designated Grievance Committee) 1974-1982. Chairman 1977-82
Lawyers Delegate to Ninth Circuit Court of Appeals Judges' Convention 1973 to 1975
  Member of Lawyers Delegate Committee 1975
Magistrate Selection Committee for U.S. District Court for District of Oregon, 1984

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

A. Other than the Oregon State Bar, Salem Area Chamber of Commerce and Oregon Association of Defense Counsel, I do not belong to any organizations that are active in lobbying.

B. (1) Civic Organizations:

Salem Area Chamber of Commerce, President 1973-74; Member of the Board 1968-75

City of Salem Budget Committee 1966-71; Chairman 1970
Chairman, Committee on Capital Needs, City of Salem 1971-2
Downtown Riverfront Study Committee - City of Salem, Land Use and Development Study; Chairman of Retail-Office Sub-Committee 1974-76
City of Salem Development Board Member, 1976-78
Salem Evaluation Review Advisory Committee to LCDC 1976
Marion County Charter Review Committee 1980-82
Director, South Salem Fire District, approximately 1960

(2) General Activities and Organizations:

Member, First Presbyterian Church
    Ruling Elder, Class of 1978-80
Board of Trustees, Salem Hospital 1979 to present; Chairman 1983-84
Director, Western Security Bank 1973-86; Chairman, 1979-80
Served on Board of Directors of:
    Boy Scouts of America, Willamette District (approximately 1970-73)
    Leslie Junior High School Parents Club, President 1972-73
    Illahe Hills Country Club, 1963-65; President 1964-65
    Young Life Committee, 1975-80
UGN Fund Drive - approximately 1975, Professional Division Chairman
Salem Exchange Club 1956-64, President, approx. 1961 District Governor 1962
Beta Theta Pi, Social Fraternity, University of Oregon Chapter, 1948
Oregon Historical Society

(3) Educational, Law Related Activities:

University of Oregon Law School Alumni Board 1973-75; President 1974-75
Development Fund, University of Oregon 1974-75
Visitors Board, University of Oregon Law School 1977-82; President of Visitors Board 1978-79

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Oregon Supreme Court, September 21, 1954
United States District Court, District of Oregon July 11, 1955
Ninth Circuit Court of Appeals, March 23, 1968

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

34 Oregon Law Review 33 (1953)

13. Health: What is the present state of your health? List the date of your last physical examination.

Good; Last physical: November 5, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

No judicial offices held.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions

or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

No public offices held. Never a candidate.

17. Legal Career:

a. Describe chronologicaly your law practice and experience after graduation from law school including:

(1) whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have not served as a clerk.

(2) whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

(3) the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected and the nature of your connection with each;

See answer to queston #6 above. Other than while I practiced with Marsh, Marsh & Dashney, I have always been with the same firm. I was an employee of Marsh, Marsh & Dashney. I have been a partner in Clark-Marsh through its history from 1958 to the present.

b. (1) What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

From September 1954 to approximately 1963, my practice was general in nature. My involvement in litigation was as an associate and in a secondary role with senior members of the firm owned by my father and uncle. That firm was Marsh, Marsh & Dashney, with its home office in McMinnville, Oregon. During that first decade, I became involved in the insurance practice representing several insurance companies in subrogation claims for property damage and minor personal injury defense. During this period of time many cases, although small in nature, were tried. I was also involved in some domestic relations and estate planning and general real and personal property law.

By 1963, my insurance defense practice had grown to the point that I was being retained by companies for major personal injury defense. During the entire decade of the 1960s and into the early 1970s, I was heavily involved in that practice. While the bulk of all cases assigned were settled, I would routinely try from 12 to 15 cases per year to actual jury verdict or judgment. The trial experience during that time was substantial.

Beginning with the early 1970s, I was involved with the emerging and ever growing field of products liability litigation representing both insurance carriers and manufacturers on the defense side. While I was still involved to some extent with domestic relations, business and estate planning, these areas of my practice began to occupy less of my time. During this time the firm grew and other attorneys assumed more and more of the other civil work. The only criminal work that I did during this period was on an appointment basis and then only in homicide cases. After about the mid-70s, I declined criminal appointments as my experience was so limited that I did not feel it was appropriate to be on the court's appointment list. Therefore, my experience in criminal law ended about 1975. In the late 1970s, I also decided to remove myself from the field of domestic relations. Examples of the products liability and business litigation are included within the cases listed in answer to questions 18 and 19. My trial experience to verdict or judgment continued to be heavy in the early and mid-portion of the 1970s. The high water mark was 1974 with over 20 trials.

Since then, the number of trials has diminished with my involvement in more complex litigation. Since 1975, I have been involved in substantial environmental litigation, including the Frady case listed under question 18, and the asbestos litigation, and FDIC litigation, listed under question 19, during the 1983-85 period.

In addition, the late 1970s saw the advent of a substantial legal malpractice defense practice. In 1978 the Oregon State Bar formed the Professional Liability Fund as the sole and mandatory legal malpractice carrier in Oregon for basic limits. I have been on the trial panel for the Professional Liability Fund since its inception. Our firm has handled nearly 100 files for the Fund and the bulk of those files have been assigned to me.

In 1983, the first asbestos cases were filed in Oregon. I was retained by Armstrong Cork Company and its carrier Liberty Mutual Insurance Company. I was involved in asbestos litigation until mid-1985 when the Wellington Facility was formed and the handling of all claims was taken over by one firm in Portland, Oregon. I still represent Armstrong in asbestos matters which involve punitive damages, but as yet only one claim has been made in this area.

In the latter part of 1984, I was retained to defend a legal malpractice case that involved a claim by the FDIC against the officers and directors of the defunct Columbia Pacific Bank in Portland, Oregon. One of the directors was an attorney and I was assigned the defense of his 18 law partners against charges of vicarious liability, direct legal malpractice and deputization. This case occupied the bulk of my time during the whole of 1985. The case was ultimately resolved through settlement in early 1986.

From late 1982 to the present, I have represented 12 counties in the State of Oregon against the State of Oregon itself. This case is listed in answer to question 18.

At present, my work is pretty well restricted to the area of legal malpractice and products liability, with some continued involvement with FDIC claims and general insurance practice. I represent some corporations in business work and do some banking law.

(2) Describe your typical former cients, and mention the areas, if any, in which you have specialized.

Clients over the years have included, or now include, insurance companies such as Ohio Casualty Insurance Company, The St. Paul, Allstate Insurance Company. Providence Washington Insurance Company, Bellefonte Insurance Company, North Pacific Insurance Company and Gulf Insurance Company; manufacturers such as Germany Geze Ski Bindings, Volkswagen of America and Volkswagen

AG; businesses such as Portland General Electric, Western Security Bank and Burkland Lumber Company; and municipalities such as the City of Salem, Benton, Washington and Yamhill Counties and the twelve counties that were plaintiff in the Tillamook v Oregon case listed under question 18.

While Oregon does not have any established specialty fields, my emphasis in the practice of law has been in the insurance defense for automobile accident cases during the 1960s, changing more to products liability defense in the 1970s, with environmental law in the late 1970s and 1980s, and with legal malpractice, accounting malpractice and asbestos in the late 1970s to the present.

c. (1) Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Year	'66	'67	'68	'69	'70	'71	'72	'73
Actual trials without settlement	7	11	12	15	14	9	8	10

Year	'74	'75	'76	'77	'78	'79	'80
Actual trials without settlement	21	17	11	8	5	4	4

My appearance in court has been regular during the last six years, but involved fewer cases. Actual trial of cases has diminished with the involvement in more complex cases that extend over several years or which involve extensive discovery proceedings.

Of the 35 asbestos cases that I was involved in from 1983 to 1985, none actually tried, but extensive discovery and motion practice was involved with each case. A regular trial schedule was set up on a three week basis by the case management judge. As the formation of the facility became more apparent, the remaining cases which I had were all settled in one negotiation package.

I have had many cases resolved on motions to dismiss or summary judgment, which, while requiring court appearance, have not actually resulted in trials. Typical of this, is a present series of five legal malpractice claims against one law firm, all of which have been consolidated under settlement conference and which appear to be resolving themselves without trial. If not, the trials would probably take place serially once a month in the upcoming months.

I have identified 17 cases that I have tried to verdict or judgment in the last five years.

(2) What percentage of these appearances was in

(a) Federal courts	1954-80	5%
	1980-86	50%
(b) State courts of record	1954-80	95%
	1980-86	50%
(c) Other courts	None	

(3) What percentage of your litigation was

(a) Civil	Prior to 1975	95%
	Since 1975	100%
(b) Criminal	Prior to 1975	5%
	Since 1975	None

(4) **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whther you were sole counsel, chief counsel, or associate counsel.**

I believe I have tried at least 173 cases since 1966. It is difficult to get an accurate count. I was sole counsel in probably 90% of these cases.

(5) What percentage of these trials was

(a)	Jury	66-2/3%
(b)	Non-jury	33-1/3%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations if the cases were reported, and the docket number and date if unreported Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

SE NAME:	Shipp v. Teague Chevrolet
IENT:	The Defendant Teague. Allstate Insurance Company
TE OF LITIGATION:	April 25-29, 1968
URT:	Circuit Court of the State of Oregn for Marion County Case No. 61321
TATION:	None.
DGE:	Hon. Val D. Sloper
TE OF JUDGMENT:	May 2, 1968
UNSEL FOR CO-FENDANT:	Frank E. Day
POSING COUNSEL:	Thomas C. Beck (Deceased)

MMARY AND STATEMENT OF ISSUES:

Shipp v Teague, was the first products liability case I fended. I was retained by Allstate Insurance Co. to fend its insured, Teague Chevrolet. The co-defendant was eral Motors. While General Motors had separate counsel was assisted by company counsel from Detroit, I actually the primary responsibility for the defense as I resented the first-named defendant. General Motors ually presented very little evidence and relied upon our e and our experts. The Shipp case predated all horities regarding Restatement §402(A). The case olved a new pickup truck with less than 50 miles istered on the odometer. The plaintiff was on her way e with the new vehicle when, according to her testimony, right front wheel came off causing the truck to upset. plaintiff was injured and brought the action for her ages.

This was my first experience using an accident reconstructionist and other experts to prove that the accident was caused by the plaintiff losing control of the truck, causing the upset which in turn caused the axle to break and the wheel to come off. A metallurgist used various tests to prove that the axle fracture was caused by a impact rather than metal fatigue as claimed by plaintiff. We also duplicated the same type of fracture on a new axle to demonstrate by comparison the like condition of the axle after fractures.

A detailed examination of the scene of the accident reconstructed the course of the vehicle, and established evidence to prove that the truck first left the road, hit a culvert, and then bounced back into the road striking the pavement sideways, with the front right wheel hitting first, breaking the axle.

The verdict was for the defendants and was not appealed. I consider this case the forerunner of all my later experience in products liability.

(2)

CASE NAME:	Clark v School District 24J
CLIENT:	Edward L. Clark, Jr., et al
DATE OF LITIGATION:	June 25-26, 1968
COURT:	Circuit Court of the State of Oregon for Marion County Case No. 65188
CITATION:	None
JUDGE:	Carrell Bradley, pro tem
DATE OF JUDGMENT:	Opinion: July 1, 1968 Decree: July 10, 1968
CO-COUNSEL:	None
OPPOSING COUNSEL:	Robert W. DeArmond DeArmond, Sherman and Barber

SUMMARY AND STATEMENT OF ISSUES:

My first venture into governmental liability was the Clark case. The Clarks had five boys all of whom had attended Swegle grade school, Judson junior high, and two had completed high school at North Salem High. When the remaining three sons were either in or about to enter high school, the school district decided that all students from the Swegle school area would be transferred from North High to McNary High school. Such a move would literally require that the students be bussed past the door of their old school and transported five miles beyond to the new school.

The primary legal issue involved the rights of a citizen within a district to question the decision of the duly elected school board. This case did not involve any discriminatory practice, nor was there any question of quality of education between one school and the other. The issue concerned the convenience of the students weighed against the right of the board to govern the district. The burden therefore was upon us to establish that the action was totally arbitrary and capricious.

In a review of the records and minutes of the district it became obvious that the individual board members were unaware of any reason for the change other than to balance student loads at all the high schools in the district. No other example could be found, however, where such a drastic and wasteful move had been made. Further, the cost of transportation and inconvenience to students and families for all school activities was extensive. The only reason the choice was made was the misbegotten idea that the parents in that area were less likely to complain.

The case was tried to the court without a jury. The district provided no evidence to support the decision and the court held the action arbitrary. No appeal was taken.

(3) CASE NAME:	Boyer v. Allstate
CLIENT:	The Defendant. Allstate Insurance Company
DATE OF LITIGATION:	December 2, 1971
COURT:	Circuit Court of the State of Oregon for Linn County Case No. 38982
CITATION:	None
JUDGE:	Hon. Wendell H. Tompkins
DATE OF JUDGMENT:	December 7, 1971
CO-COUNSEL:	None
OPPOSING COUNSEL:	Richard T. Kropp 507 Washington Street P.O. Box 279 Albany, Oregon 97321 (503) 928-6171

SUMMARY AND STATEMENT OF ISSUES:

The above-captioned case, which did not have any appellate review by either party, was tried by me on behalf of Allstate Insurance Company, in defending the company itself rather than any insured. The claim was brought by the plaintiff, Donald Boyer, who was employed by Allstate as a stabilized agent under a particular form of Allstate Agent Compensation Agreement.

The association between Mr. Boyer and Allstate was terminated and the litigation arose over the right of Allstate Insurance Company to enforce the terms of its employment agreement, particularly with regard to the computation of Mr. Boyer's final compensation. While the amounts claimed as termination compensation were not great, the case did effect some several hundred Agent Compensation Agreements then in effect across the country. Therefore, the trial was attended by one of the general counsel of Allstate Insurance Company and the case was being watched carefully by all divisions of the company and particularly the agents then under contract.

The case was determined by Judge Wendell H. Tompkins, sitting without a jury. His decision was in favor of the defendant Allstate.

The issue of particular significance involved the ability of a corporation to prepare and interpret the terms of its employment agreements. There is always a danger of such a contract being construed as one of adhesion and therefore invalid. Our defense was based upon the lack of any ambiguity in the contract and the absence of any intent to deceive. The case also involved the question of what constituted termination of employment under such a contract and its comparison with other contracts in the industry relating to commission sales agents.

(4.) CASE NAME: Leonard v Jackson, et al

CLIENT: The Defendants, Glen L. Jackson, et al, Highway Commission for the State of Oregon, for insurer Allstate Insurance Company

DATES OF LITIGATION: 2/17/72 to 2/22/72

COURT:
Court of Appeals of Oregon
Supreme Court of Oregon
Circuit Court of State of Oregon
for Umatilla County
Case No. 9796

CITATION:
6 OrApp 613 (1971)
488 P2d 838

JUDGE: Hon. William W. Wells

DATE OF JUDGMENT: February 25, 1972

CO-COUNSEL:
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SUMMARY AND STATEMENT OF ISSUES:

The case of Leonard v Jackson, filed in Umatilla County, Oregon, involved a claim against members of the State Highway Commission and local Highway Commission employees for damages resulting from injuries sustained when the plaintiff was struck by a rock which fell from the cliffs adjacent to the road and went through the windshield of her car.

I had previously represented the state officials in the case of Smith v Cooper, 256 Or 485. That case set forth the latest interpretation of the law of governmental immunity in claims against the State and its officials. Relying upon the Smith case, we filed a demurrer to the claim in Leonard v Jackson. This demurrer was sustained by the trial court. The plaintiff appealed to the Court of Appeals and, in a decision rendered September 21,1971, the Court of Appeals reversed the trial court and sent the case back to Umatilla County for trial. This decision, together with the denial of the Petition for Rehearing and the Petition for Review to the Supreme Court is reported in 6 OrApp at page 613. In the appellate proceedings, I was assisted by Mrs. Norma Paulus in the preparation of the brief. Mrs. Paulus presented the oral argument to the appellate court.

Thereafter, the case was tried in Umatilla County before a jury, Judge Wells presiding. The trial resulted in a verdict in favor of our clients, which was entered on the 25th day of February, 1972. In the trial of the case, I acted as chief counsel, assisted by Mr. Eric Lindauer, who was a new associate with our firm at that time.

Both the case of Smith v Cooper and Leonard v Jackson are significant in that they are the first cases to examine the concepts of governmental immunity under the new State Tort Claims Act and were the first cases to deal with a modern analysis of the distinction between discretionary and ministerial duties of state officials.

Leonard v Jackson was important, in my view, for several reasons. First, it was challenging because it gave me an opportunity to practice in a different forum in Eastern Oregon. Second, the case was of major concern to the Highway Commission in that its liability for rocks, wild animals, or other objects which may be upon a roadway posed an enormous area of potential responsibility. Had the case been lost, it could have established a precedent that would have had considerable effect upon the cost of highway construction and maintenance. Third, the injuries in the case were severe and the exposure to the State of Oregon and its carrier was great.

(5.) CASE NAME:	Fish v Volkswagen, et al
CLIENT:	Volkswagen of America, Inc.
DATES OF LITIGATION:	3/10/75 to 3/15/75
COURT:	U.S. District Court for District of Oregon Case No. 73-196
CITATION:	None
JUDGE:	Hon. James M. Burns
DATE OF JUDGMENT:	March 19, 1975
CO-COUNSEL:	Michael C. McClinton 880 Liberty Street NE Salem, Oregon 97301-2206 (503) 581-1542
COUNSEL FOR CO-DEFENDANT:	Lyle C. Velure 132 E. Broadway Suite 636 P.O.Box 7275 Eugene Oregon 97401 (503) 342-7015
OPPOSING COUNSEL:	Walter H. Sweek Frederick Roehr 1027 E. Burnside Street Portland, Oregon 97214 (503) 234-6527 Robert L. McKee 7318 Leavitt Avenue Portland, Oregon 97203 (503) 286-5733

SUMMARY AND STATEMENT OF ISSUES:

The case of Fish v Volkswagen of America, Inc. & Stone's Volkswagen, Inc. was a wrongful death action filed by the administratrix of the estate of Linda Odland, who had died as the result of an automobile accident which occurred on May 25, 1970, in Douglas County, Oregon. The decedent and her infant child were travelling in a Volkswagen vehicle on Interstate 5, when the vehicle left the road at a high rate of speed, became airborne and collided with a large rock. The child survived the accident, but was too young to testify.

The case against Volkswagen of America was based on the theory of strict liability for manufacturing defects which rendered the vehicle unreasonably dangerous.

The main issue in the case concerned the allegation of a manufacturing defect in the braking system and wheel lubrication system of the Volkswagen vehicle. The retail automotive dealer was also charged with negligent repair service performed upon the vehicle, as well as the retail dealer's responsibility under the doctrine of strict liability.

I was chief counsel in this trial, being assisted by Mr. Michael C. McClinton of this office. While I had tried products liability cases on prior occasions, this was the first case of mine to deal with the developing area of strict liability in Oregon.

The case was tried before a jury in the U.S. District Court for the District of Oregon, with Judge Burns presiding.

A verdict was rendered by the jury in favor of both defendants and no appeal was taken from this case.

The trial, which extended for one week, involved testimony of several engineers called on behalf of the plaintiff, as well as those called on behalf of the defendants. It was the plaintiff's contention that the brake master cylinder was defectively manufactured allowing the loss of brake fluid and the ultimate failure of the braking system making it impossible for the driver to control the vehicle.

From the defense standpoint, we established that the brake fluid had been lost from the brake lines during, or after, the accident in order to prove that the braking system was in good order and that the accident was caused by the inattention of the driver.

There was a peripheral issue involving the right of a foreign administratrix to bring suit within the jurisdiction of the state of Oregon and the District Court of the District of Oregon. Also, there was the issue of negligence against the dealer intermingled with the issue of general strict liability for defect and manufacture alleged against the distributing company, Volkswagen of America, Inc.

In the development of the law of products liability in Oregon, the theory of crashworthiness had not yet been adopted by the Oregon Supreme Court, as it was later in McMullen v Volkswagen, 274 Or 83 (1976). (I was also chief counsel in the McMullen case.) Thus, this case was tried solely on the basis of a defect in manufacture being the direct cause of the accident, rather than a defect in design or crashworthiness being an enhancing element of damages.

(6.) CASE NAME:	Lewis v IBM & Adams
CLIENT:	IBM and Adams
DATES OF LITIGATION:	4/28/75 to 4/29/75
COURT:	U.S. District Court for the District of Oregon Case No. 73-55
CITATION:	None
JUDGE:	Hon. James M. Burns
DATE OF JUDGMENT:	May 13, 1975
CO-COUNSEL:	Michael C. McClinton 880 Liberty Street NE Salem, Oregon 97301-2206 (503) 581-1542
OPPOSING COUNSEL:	Gary K. Jensen 91 Madison Eugene, Oregon 97402 (503) 484-1021

SUMMARY AND STATEMENT OF ISSUES:

Lewis v IBM was perhaps the most complicated case I had been involved in to that time. While the basic issue was one of the interpretation of an employment contract and termination pay, the decision affected all contracts across the United States relating to quota territory salesmen working for International Business Machines Corporation. I acted as chief counsel and tried the case. Mr. McClinton of this office assisted. Also present, but not participating in the actual trial, was the General Counsel of IBM, Mr. Robert J. Bennett, whose address at that time was Parsons Pond Drive, Franklin Lakes, New Jersey 07417. Phone number (201) 848-1900.

The case was tried to the court, without a jury, Federal District Judge James M. Burns presiding. The court rendered its judgment in favor of the defendants and no appeal was taken from that judgment.

The case involved an employee who terminated his employment in July of 1972 after approximately ten to twelve years experience with IBM. At the time of his termination, his separation allowance was refused on the basis that he had voluntarily resigned and was therefore not entitled to a

It was an intriguing and intricate case and important because of the far reaching effect an adverse decision would have had on all our client's contracts and capability to control its corporate work.

(7.) CASE NAME: Seitsinger v Volkswagen, et al

CLIENT: Volkswagen of America, Inc.

DATES OF LITIGATION: 9/13/78 to 9/25/78

COURT: Circuit Court of the State of Oregon
for Multnomah County
Case No. A7701-00710

CITATION: None

JUDGE: Hon. Patrick E. Dooley

DATE OF JUDGMENT: October 2, 1978

CO-COUNSEL: Michael C. McClinton
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OPPOSING COUNSEL: Frank H. Pozzi
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SUMMARY AND STATEMENT OF ISSUES:

The case of Seitsinger v Volkswagen, tried in Multnomah County Circuit Court by jury, presided over by Judge Patrick E. Dooley, was the first case I tried involving a pure "crashworthy" theory under the doctrine of McMullen v Volkswagen, 274 Or 83 (1976).

In the Seitsinger case, a young woman riding as a passenger in a Volkswagen Type I, or what is commonly referred to as the bug or beetle, was severely injured in a head-on collision with a car being operated on the wrong side of the road by an unlicensed and uninsured driver. As a result of this collision, the plaintiff received cervical spine injuries which rendered her totally paraplegic and partially quadraplegic. The prayer in the complaint was for five million dollars. The case was tried for twelve days and terminated with a jury verdict in favor of the defendants. The judgment was entered on that verdict, motion for new trial was denied, and no appeal was taken.

The case initially named as defendants both Volkswagen AG, the German manufacturing Company, and Volkswagen of America, the distributing company, as well as Riviera Motors and Paul Koch Volkswagen, the wholesaler and retail dealer of the car in question.

Prior to trial, the distributor Riviera Motors was represented by Mr. Richard Bodyfelt, of 300 Powers Building, 625 SW Yamhill Street, Portland, Oregon 97204, phone number (503) 243-1022, and the retailer Paul Koch Volkswagen was represented by Mr. John H. Holmes of 5th Floor, The 811 Building, 811 SW Front Avenue, Portland, Oregon 97204, phone number (503) 223-4131. Prior to trial, tenders had been made to our clients, Volkswagen of America and Volkswagen AG to assume the defense of the wholesaler and retailer. These defenses were assumed at the time of trial and Mr. Bodyfelt and Mr. Holmes were excused from further participation in the trial. Thereafter, the case was tried by myself, with the assistance of Mr. Michael C. McClinton of our office.

The important issue involved in this case was crashworthiness. All parties readily agreed that nothing relating to the manufacture or the design of the vehicle caused the accident, but the plaintiff's contention was that the design of the vehicle enhanced the injuries received in the accident.

This is a very difficult theory to defend to a jury as it involves such technical engineering evidence. It requires the defendant not only establish that the design of the vehicle did not enhance the injury, but that in fact the injury would have resulted irrespective of the design, make, or model of the car, as compared to other designs, makes, or models of the same class of vehicles.

A secondary major issue in the case was the ability of the defendant to utilize the "seat belt defense" to establish that, had the plaintiff worn her seat belt, she would not have been injured. The trial court held that we could not use the seat belt defense per se, but could prove that the car was "crashworthy" because it had a seat belt for passenger use.

The main difficulty involved the tendency of people to believe that a small car is less safe than a large car.

In the Seitsinger case, extensive testimony by engineers, physicists, physicians, and the kinematics experts was introduced. Hundreds of photographs and exhibits were admitted and the jury was then asked to decide a very complex case involving injuries which affected the natural sympathy of any person involved.

The prayer in the Seitsinger case, being five million dollars, was the largest sum that I had ever defended against and opposing counsel was extremely effective and experienced.

(8.) CASE NAME: Frady, et al v PGE

CLIENT: Portland General Electric

DATES OF LITIGATION: This case was settled after appeal without trial.

COURT: Court of Appeals of State of Oregon
Circuit Court of the State of Oregon
for the County of Marion
Circuit Court Cases Nos. 111930-36

CITATION: 55 OrApp 344, 637 P2d 1345 (1981)

JUDGE: Hon. Richard D. Barber

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SUMMARY AND STATEMENT OF ISSUES:

Portland General Electric Company is a local utility which provides electrical service for most of northwestern Oregon. As part of its electrical energy producing facilities, it established a substantial jet turbine generator system a few miles east of the city limits of Salem, Oregon. The predominant area surrounding the facility was agricultural, but there were residential homes in the area of the installation. The construction and operation thereof was a source of great concern to a group of residents. I was chief counsel throughout.

Ultimately, several cases were filed, which are listed on the brief to the Court of Appeals. In general, these claims allege that the operation of the plant produced low frequency sound which was detrimental to the health of the plaintiffs and damaging to their property and livestock.

The case was of great importance to Portland General Electric Company inasmuch as they had other facilities of like nature established in Oregon and the need for their standby electrical energy production seemed critical.

The cases were brought on theories of trespass and nuisance and, aside from ancillary issues such as the statute of limitations and special damages, posed a serious question about environmental effects from the presence of a legally established and licensed facility.

The cases pended for a number of years, primarily because of the need for continued expert examination and testing of the facility. Finally, the cases were delayed further by the voluntary dismissal of the cases by the plaintiffs and the refiling approximately one year later. After extensive pleading conflicts, the cases were dismissed and the plaintiffs filed an appeal to the Court of Appeals. The dismissal was affirmed in part and reversed in part and thereafter the matter was ultimately settled for a very modest amount.

Of special significance in the preparation of the defense of this case was the general lack of understanding of the attributes of sound and the effects of sound upon human beings and structures. Aside from the vast testing that was undertaken, we had to be educated in the science of sound in order to determine how we would present understandable evidence to a jury that would vindicate the facility from any actual effect upon the plaintiffs. The question of psychological hypersensitivity to an unwanted facility was deeply involved in this case.

Therefore, aside from engineers and audio experts, we also retained the services of medical experts and psychologists regarding the effect of low frequency sounds. This is an area which is unestablished in science to any certainty and, therefore, was most interesting, as well as challenging, in the preparation of a very serious case.

(9.) CASE NAME: Warren v Washington County

CLIENT: Washington County

DATES OF LITIGATION: 10/11/83 to 10/13/83

COURT: Circuit Court for State of Oregon
County of Washington
Case No. 39-930

CITATION: None

JUDGE: Hon. Richard L. Barron

DATE OF JUDGMENT: March 12, 1984

CO-COUNSEL: None

OPPOSING COUNSEL: David G. Frost
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SUMMARY AND STATEMENT OF ISSUES:

Warren v Washington County, while not as far-reaching or involved as some of the cases listed above, was novel and intriguing in its individuality. The case involved a claim by a member of the County Commission against Washington County for alleged damages caused by the way the County had constructed a road adjacent to her property in a rural area. The case immediately developed conflicts within the county government which required the county counsel to withdraw from any active role in the case. It also required the firm of attorneys who represent the insurance carrier for the county to withdraw, as they had other cases defending the Board of Commissioners which would include the plaintiff. Therefore, I was requested by the county and by the insurance carrier for the county to act as special counsel for the county and defend the case.

From its factual standpoint, the case involved the discretionary powers of a county highway department and its officials and employees to design and construct county roads. In this respect, the case involved interpretation of county road manuals and requirements for construction of roads within private developments and the effect of such manuals upon the county itself.

The case also was interesting from a preparation standpoint, in that the confidentiality was always concerned with the public nature of the records within the courthouse and county offices to which the plaintiff had absolute access. This was complicated by the fact that one of the other county commissioners was also adverse to the county's position. The combination contributed to humorous situations in the courtroom and widespread interest throughout the courthouse in the trial of the case.

This case was also interesting from an engineering standpoint, as well as examination of ancient records and surveys of property ownership. The case was tried to the court without a jury and, after the trial, the court rendered its verdict in favor of Washington County. The case was not appealed.

(10.) CASE NAME: Tillamook, et al. v Oregon

CLIENT: 12 Oregon Counties

DATE OF LITIGATION: 1/17/84 - 1/20/84

COURT: Circuit Court of the State of
Oregon for Marion County #135-593
Court of Appeals of Oregon #A32152
Supreme Court of Oregon #S32255

CITATION: 75 OrApp 344, 707 P2d 585 (1985)
302 Or 404 (1986)

JUDGE: Hon. Duane R. Ertsgaard

DATE OF JUDGMENT: April 18, 1984

CO-COUNSEL: None

OPPOSING COUNSEL: Timothy Wood
Department of Justice
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SUMMARY AND STATEMENT OF ISSUES:

The case of Tillamook v Oregon involved interpretations of the Oregon statutes relating to the distribution of revenue produced from the Oregon state forest lands and constitutional amendments authorizing the sale of bonds for reforestation in the state.

In the late 1930s and early 1940s, Oregon established a state forest system authorizing counties to transfer tax foreclosed timberlands or burnt over timberlands to the state of Oregon, to be managed by the Oregon State Department of Forestry. In return for the transfer, the counties were assured a certain percentage of the revenue that would develop from those forests. Over the years as reforestation took place on large tracts of land within the counties involved, the question arose as to just how much revenue they were going to produce. As fiscal resources of the state of Oregon became more limited, the question arose as to the state's power to unilaterally amend the laws and change the formula for distribution of forest revenues.

Contemporaneously with this historical chain of events, the same lands were being reforested pursuant to a bond program which was funded by the sale of general obligation bonds by the state of Oregon. Rather than establish a sinking fund to discharge these bonds, the state of Oregon would regularly appropriate enough funds from the general fund to keep the bond interest and principal paid during the life of the bond. As this procedure came to a close, the Attorney General of the state of Oregon issued an opinion stating that the counties not only had to pay back the principal and interest on the bonds, but also had to pay interest to the state of Oregon on its contributions to the sinking fund. This was in controvention of what the counties felt had been agreed upon with the establishment of the bonding program.

Consequently, we filed a complaint seeking declaratory relief on behalf of the twelve counties asking that the arrangement set forth in the statute regarding the distribution formula be declared a contract between the state and the counties and declaring that the state was not entitled to interest on the sums it voluntarily contributed to the bond sinking fund.

The state of Oregon resisted the declaratory judgment on several grounds, including lack of capacity of a county to sue the state, no justiciable issue, plenary power in the state and, regarding the interest question, that statutory construction justified the state's position.

The state moved for a summary judgment, to which the counties responded with an 8-volume memorandum in opposition. The trial judge denied the motion for summary judgment. The case was tried to the Court without a jury from January 17, 1984 to January 20, 1980. Judgment was entered in favor of the counties on the 31st day of May, 1984. I acted as sole trial counsel for plaintiffs.

Thereafter, the state appealed to the Court of Appeals. The issue of justiciable issue was not raised. The Court of Appeals affirmed the judgment in favor of the counties regarding the interest issue, but dismissed the judgment relating to the existence of a contract on the distribution formula as not being based upon a justiciable issue.

We thereupon petitioned for review to the Supreme Court of the State of Oregon. This petition was allowed with a request for answers of certain specific questions by the Supreme Court. On December 30, 1986 the Supreme Court allowed partial relief to the Counties on the contract issue and affirmed the Court of Appeals on the balance of the queston of justiciable controversy. The interest issue remained resolved in favor of the Counties.

This case has enormous significance, both to the state and the counties involved in the state forest program. Some 690,000 acres of timberland are involved and the present and future value of the timber thereon is astronomical. Thus, percentage of distribution of timber revenues from these lands can have a devastating effect upon the revenues available or not available to a given county. Since the counties, in effect, gave up their tax base by transferring the property to the state, the loss of even a few percentage points of revenue by any unilateral action of the state could be catastrophic.

In the preparation of the case, it was necessary to examine the history of the ownership of tax foreclosed lands by the counties and their rights in regard thereto from the birth of the state to the time of the trial. It was also necessary to carefully examine the powers given to the county by the state, with the ultimate question being the intergovernmental relationships between the state and the counties.

The question of governmental versus proprietary interests of counties was paramount throughout the extensive legal memorandums and briefs, as well as at the trial and presentation of evidence.

This litigation, which extended over a period in excess of two years, wonderfully occupied the mind.

The interest computations at the time of trial totalled in excess of $31,000 000 and, thus, a decision in favor of the counties in that respect was of tremendous financial benefit. The issue of contractual rights is undergirded by the existence, or lack thereof, of a justiciable issue. The Supreme Court's decision affirming the Court of Appeals, while encouraging in many respects, probably means that the problem will have to be relitigated in the event of any future attempt by the state to tamper with the distribution formulas. On the other hand, the Supreme Court decision regarding the basic issue of the rights between counties and states has now been addressed and that decision will affect the association between counties and the state of Oregon for the foreseeable future.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege,)

The first area of significant legal activities I have pursued involves the law of products liability. Aside from the cases included in question 18 above, I have been on the defense side of many other cases, some of which went to trial while others settled. These cases have involved ladders, pop bottles, lawn mowers, berry picking machines, insecticides, fertilizers, automobiles, and airplanes.

The case of McMullen v. Volkswagen 274 Or 83, 545 P2d 117 (1976) is by far the most important of these cases. The case involved a double fatality arising out of a collision between a Volkswagen van and a Dodge sedan. The van was in the process of a left turn when it was struck by the Dodge which was travelling at a high rate of speed. The two occupants of the van were both ejected and killed. McMullen was the first case presented to the Supreme Court of Oregon on the theory of "crashworthiness". At the time there was a split of authority on the crashworthy doctrine and there was still a lot of resistence to the concept. The Oregon court found the McMullen case appropriate for the adoption of that test. The case was then prepared for trial, but settled for a nominal amount, and thus was never tried.

The second area of significant activity has been in the field of governmental tort liability. Starting with the case of Clark v Salem School District 24J (see question 18 above) and continuing with Smith v Cooper 256 Or 485, 475 P2nd 78 (1970), Leonard v Jackson, 6 OrApp 613, 488 P2d 838 (1971), (see question 18 above) and a number of other cases since, I have been involved with some of the more interesting cases dealing with governmental immunity and tort liability in the past 20 years.

Smith v Cooper, was decided in the Supreme Court of Oregon on the legal issues and thus was never actually tried. The case involved a death claim in which the plaintiff charged the state highway department with negligent design of a highway. The decision centered on the discretion of the department to make designs within the restrictions of budget and overall need. The court felt it would be impossible for a court or jury to second guess such discretionary activity. Only ministerial functions could be reviewed. The Smith case is among the most important decisions in the state regarding governmental liability. It was codified in the Oregon code and has been the threshold case ever since.

The third significant area involved asbestos litigation in Oregon. The following is a summary of one such case in which I was lead counsel. After extensive discovery, the case settled.

CASE NAME:	Metzger v Johns-Manville, et al
CLIENT:	Armstrong Cork Company
DATE OF LITIGATION:	Settled, not tried.
COURT:	U.S. District Court for the District of Oregon 83-1267LE
CITATION:	None.
JUDGE:	Hon. Edward Leavy
DATE OF JUDGMENT:	February 4, 1984 Order of Dismissal
CO-COUNSEL:	None
COUNSEL FOR CO-DEFENDANTS:	Garr M. King Joseph C. Arrellano 2600 Pacwest Center 1211 SW Fifth Avenue Portland Oregon 97204 (503) 228-6191

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SUMMARY AND STATEMENT OF ISSUES:

The Metzger case is one of 35 cases that I was involved with representing Armstrong Cork Company and its carrier Liberty Mutual Insurance Company in asbestos litigation during 1983, 1984 and 1985. All of the cases except one in Oregon were filed in the U.S. District Court and all of them were assigned to Judge Leavy for case management and trial.

Other District Judges in the district were used for settlement judges.

The defense counsel for the different companies formed an informal coalition in order to establish economical and effective case management. In each case, at least two lawyers were named as lead counsel. E. Pennock Gheen, III, and I were named as lead counsel in the Metzger case.

The issues in the asbestos litigation were standard with those across the country involving basically the causation of exposure to asbestos, the difficulties of identifying products and time of exposure, and the various defenses of contributory negligence and the effect of smoking and other environmental exposures.

This case had particular significance to our office with the advent of computerization of discovery material. We found it necessary and appropriate to have each witness cataloged as they were identified by other witnesses in discovery under the several cases. It was also useful in keeping track of job locations and product identification established by those witnesses.

While there was a combined effort by the attorneys representing the many defendants, each did retain its own autonomy for settlement purposes, as well as defenses that were particularly applicable to a given manufacturer or supplier. We did, on the other hand, cooperate fully in the discovery and the dissemination of discovery materials not particularly confidential to our own clients. This arrangement continued until late 1985 when the Wellington Facility was established by the asbestos industry for the combined defense of asbestos cases. At that time, our firm, together with all but one of the co-defending firms, closed up existing files, in our case by settlement, and turned the business over to the Facility-appointed attorney.

Although some of the cases started, and all of them came close to trial, none of them actually went through trial prior to the formation of the facility.

I include the asbestos cases among the most significant cases in my career for the reason that they constituted a new field of interest, one of great complexity, and innovation in discovery. The asbestosis cases will clearly be important to the future of American jurisprudence in that they will effect the handling of all environmental and toxic tort cases.

I also feel that the asbestos cases were important to me personally by allowing me to learn how many lawyers involved with a single piece of litigation can effectively handle it from a case management standpoint. Without some organization and control, coupled with effective court supervision, the asbestos cases were clearly capable of clogging the District Court calendar for years on end.

The fourth major area of activity involved the recent litigation by the FDIC as receiver of failed banks. This general field has focused upon individual director liability and is often referred to in literature dealing with the insurance crisis and the exodus of board members from the corporate boards of America. The most significant of these cases in which I have been involved also had the added legal question about the liability of partners of attorneys who serve on boards. The summary of this case is as follows.

CASE NAME:	FDIC v Anderson, et al
CLIENT:	18 Partners of an attorney-director in Columbia Pacific Bank, who were insured by the Oregon State Bar Professional Liability Fund
DATES OF LITIGATION:	This case was settled prior to trial through settlement conferences, after pending from December, 1984 through March, 1986.

COURT:
Circuit Court for State of Oregon
County of Multnomah
No. A8411-06814

CITATION:
None

JUDGE:
Honorable Lee Johnson

DATE OF JUDGMENT:
April 9, 1986

CO-COUNSEL:
None

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SUMMARY AND STATEMENT OF ISSUES:

The case of FDIC v Anderson, et al was fortunately settled as it would have taken weeks, if not months, to try and would have ended with incredible costs and expense to all of the parties involved.

This case was the first, to my knowledge, wherein the Federal Deposit Insurance Corporation, as receiver designated by the State of Oregon, brought an action on behalf of a closed bank against the officers and directors on the basis of negligence in the operation of the bank and violation of banking laws.

One of the directors and founders of the bank was an attorney in a medium-sized firm in Portland, Oregon. This particular attorney was named in a number of counts in this case, some of which alleged that he represented the bank and was guilty of direct malpractice in that representation and, further, that he was guilty of malpractice by his decisions as a director.

I represented 18 partners of this attorney-director, all of whom had been named in the case and were sued on the basis of vicarious liability, deputization, and direct malpractrice. The case was immediately assigned to the Honorable Lee Johnson, as it was evident to the Presiding Judge in Multnomah County that close case management would be necessary in order to handle the many and varied issues raised by the many parties involved. Extensive motions were filed on behalf of all parties and, after some past directors of the bank were excused under the Statute of Limitations on summary judgment, the case evolved into a massive process of discovery. Documents from the entire history of the bank, numbering in the thousands, were cataloged and examined, and depositions were taken for a period of approximately eight months. This case dominated my career for the entire year 1985 and was responsible for extensive shuffling of workloads within the firm. The entire claim was for some $14,000,000 plus interest, the ultimate claim exceeding $20,000,000.

The principal issues that I was concerned with as counsel for attorneys were as follows:

1. The issue of deputization, which is a legal theory known in the area of securities violations, but which to my knowledge had never been used successfully by the FDIC or the FSLA against partners or

associates of directors in commercial banks or savings and loan companies. Considerable briefing and study was made of this issue and, while the court struck the matter from the plaintiff's initial complaint, it was clearly part of the discovery process throughout the pendency of the case.

2. The issue of vicarious liability of partners of an attorney-director. The issue here was whether the actions of an attorney-director always constitute the practice of law so that partners would be responsible for any negligent conduct of the director.

3. The vicarious liability issue in general is the common issue found in any legal malpractice case concerning standard of care. While the usual rule of reasonable care and standards of practice in the community, under given circumstances, might be easy to state, it is very difficult to apply when intermingled with the general duty of officers and directors of a banking institution. Thus, a great deal of my time was spent in determining what the actual duties of a director of a financial institution included and then weighing those against legal standards wherever I could find them to make an evaluation of whether the facts in the case would actually support a finding of malpractice. I was, therefore, required to evaluate the actions of the officer-director, even though he wasn't one of my clients.

This was clearly the most involved piece of litigation on which I have ever worked.

The fifth area involves the two-fold concern of legal ethics and legal malpractice. Since the beginning of my practice I have been involved in state bar committees on legal ethics and disciplinary procedure and practice. I served on the local grievance committee for the mid Willamette valley counties for eight years hearing every kind of client complaint. I have also taken part in trials of disciplinary matters, one of which was In Re Lathen, 294 Or 157, 654 P2d 1110 (1982). Coupled with this work in the field of ethics I have become heavily involved in the defense of legal malpractice cases. I have used this experience as an opportunity to try evaluating the ethical education of students and to assist in educating new attorneys on the importance of ethics and organization in their practice. While usually not related to a particular case, I consider my efforts here to be among the most significant legal activity I have pursued.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensaton agreements, future benefits, and other continuing relationships with business associates, clients or customers.

(1) Malcolm F. Marsh, P.C. Profit Sharing Plan

I am the sole participant with benefits in the Malcolm F. Marsh, P.C. Profit Sharing Plan (the "Marsh Plan"). That plan was adopted effective January 1, 1981 and was terminated effective December 31, 1985. The trust is frozen. I am 100% vested in all benefits. Benefits may be paid upon death, disability, or my reaching age 65, although I have certain rights to postpone receiving benefits. Benefits may be paid in a lump sum or in installments to be paid in my life expectancy or my spouse and my joint life expectancies.

The assets of the Marsh Plan are invested in a group trust. Other plans having investments in the group trust include: Edward L. Clark, Jr. P.C. Profit Sharing Plan (a terminated plan with a frozen trust); Edward L. Clark, Jr. P.C. Defined Benefit Plan; Eric B. Lindauer P.C. Profit Sharing Plan; Michael C. McClinton P.C. Profit Sharing Plan.

As of December 31, 1985, my share in the Marsh Plan was $78,829.56.

(2) Clark, Marsh, Lindauer & McClinton Self-Employed Retirement Plan and Trust

I am one of several participants in the Clark, Marsh, Lindauer & McClinton Self-Employed Retirement Plan and Trust (the "Self-Employed Plan"). That plan was adopted in 1968 and is an active plan to which contributions are being made. I am 100% vested in all benefits. Benefits may be paid upon death, disability, or my reaching age 65, although I have certain rights to postpone receiving benefits. The Self-Employed Plan also allows benefits to be received upon termination of employment with the Clark, Marsh, Lindauer, and McClinton partnership, although the policy in the past has been to not allow distribution until death, disability, or age 65. Benefits may be paid in a lump sum, installments to be paid in my life expectancy or my spouse and my joint life expectancies, or a joint and survivor annuity for my spouse and myself.

As of December 31, 1985, my share of the Self-Employed Plan assets was $422,226.74, of which $316,857.82 was from partnership contributions, and $105,368.92 was from my voluntary contributions. The assets of the plan are invested in a trust that is separate from the group trust in which the Marsh Plan assets are invested.

For both plans, the trustee is Pioneer Trust Bank, and the administrative committee members are currently Edward L. Clark, Jr., Eric B. Lindauer, Michael C. McClinton, and myself.

(3) Twenty-one percent partnership interest in the law firm of Clark, Marsh, Lindauer and McClinton, an Oregon partnership.

(4) One-fourth partnership interest in the real estate investment partnership of Clark, Marsh, Lindauer & McClinton. The property owned by this partnership is leased to the law partnership.

(5) One-third interest in South River Road Property partnership which owns 70 acres of undeveloped land. The other two partners are long-time acquaintances and occasional clients.

(6) Two-fifths interest in Dabob Bay - vacation property. Mr. Joseph I. Eoff owns two-fifths and my uncle, Eugene E. Marsh, owns the remaining one-fifth interest. I have in the past provided legal services for Mr. Eoff, but have had nothing pending in the last several years.

(9) I own jointly with my wife 5595.138 shares in Western Security Financial Corporation, the holding company of a local commercial bank, which is a customer of the law firm.

(10) I am a co-trustee in the Cushing-Marsh Shadden Trust, which owns the vendors' interest in two land sales contracts involving real property located in Yamhill County. These contracts are being collected through an escrow with Pacific Western Bank. I own a one-tenth interest in the receivables held in this trust. Neither I nor the law firm represent any of the other parties involved.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   The only future or continuing relationship with business associates, clients or customers will be (1) the purchase agreement with my past partners, as described in #5 below; (2) my interest in the office retirement plan, as described in #(1) & #(2) above; and (3) the joint ownership in real property interests, as described in #(4), #(5) & #(6) above. There are no other arrangements, options, deferred compensation agreements, or other benefits.

   I would resign my position on the board of trustees of Salem Hospital and its parent company. I would resign from the administrative committee of the office retirement and profit plans. I would attempt to dispose of all real property held for business purposes in which others are co-owners. In this regard, I intend to transfer my interest in the office building to my wife who will hold it or sell it to the remaining partners, at their option. I realize that a transfer to my wife does not remove a potential conflict, but feel it is best that I remove myself from personal involvement with business partnershps or other entities. I have offered my interest in the undeveloped property to the other two co-owners.

   I would decline to hear or discuss any matter presented to the court that involved any family member, any past partner or associate in the firm, or any of the individuals who are present or past joint owners of real property. I would also decline hearing any matter that involved any personal acquaintance or past business associate or client which might raise a question or appearance of impropriety or bias. I would follow the Canons of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Pursuant to the firm partnership agreement, I will be paid an amount equal to my capital account, adjusted to the fair market value, and my share of calculated accounts receivable through the date of termination.

   The responsibility for all pending litigation will be assumed by my partners and I will be paid for my share of the then existing work in process on the basis of one-half of my normal partner's share as those fees are collected. All sums will be paid within three years.

6. Please complete the attached financial net worth statement in detail.

   (See attached)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks			
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule			
Real estate mortgages receivable			
Autos and other personal property			
Cash value—life insurance			
Other assets—itemize:			
Total assets			

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule			
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities			
Net worth			
Total liabilities and net worth			

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)			
Are you defendant in any suits or legal actions?			
Have you ever taken bankruptcy?			

PLEASE SEE ATTACHED FINANCIAL

STATEMENT.

February 1, 1987

FINANCIAL REPORT
MALCOLM F. & SHARI MARSH

ASSETS:

CASH		
Ladd & Bush, U.S. National Bank - Jt. checking	$2,000	
Western Security - Jt. checking	1,000	
Western Security - Jt. Money Market	52,000	$ 55,000
SECURITIES		
Listed		
200 shs. Ga.Pac. at 46 (Jt.)	$9,200	
67 shs. La.Pac. at 37 (Jt.)	2,479	
384 shs. AmGuaranty Corp. at 2 (Jt.)	768	
Unlisted		
5595.138 shs. West.Sec.Bank at 6 (Jt.)	33,571	
364 shs. Commercial Bank at 13 (H)	4,732	
30 shs. Michaelbook Estates, Inc. at 250	7,500	
60 shs. McMinnville Industrial Promotions at 25	1,500	
Shearson-Lehman		
IRA (H)	923	
Cash Account (H)	32,065	
IRA (W)	1,301	
FMA (W)	67,452	$161,491
MISCELLANEOUS		
Clark, Marsh, Lindauer & McClinton Self-Employment Plan	$422,227	
Malcolm F. Marsh PC Profit Sharing Plan	78,828	
25% interest in Clark, Marsh, Lindauer & McClinton Partnership	150,000	
Shadden Contract balance	22,703	
Lorenz Note Balance	1,448	
Cash Value - Life Insurance	23,403	$698,609
REAL PROPERTY		
Home -- 2525 Birds Hill Drive South Tenants by Entirety	$175,000	
1/3 interest in South River Rd. Property (H)	100,000	
Dabob Bay Beach Club (H)	60,000	
1/4 interest in Clark, Marsh, Lindauer & McClinton Building (H)	95,000	$430,000
PERSONAL PROPERTY		
1985 Toyota (Jt.)	10,000	
1979 Suburban	10,000	
1979 Rabbit (Jt.)	2,500	
17' Boston Whaler (Jt.)	9,000	
Household furnishings, equipment, jewelry (Jt.)	50,000	$ 81,500

TOTAL ASSETS		$1,426,600

LIABILITIES:

Real Estate Mortgage on home Payable to US Bancorp Mortgage Co. (Jt.)	$ 11,810	
25% interest in real estate mortgage on Clark, Marsh, Lindauer & McClinton Building 1/4 interest against 1/4 interest listed under Assets - Real Property. Owed to Pioneer Trust Company, Salem, Oregon.	21,250	
25% interest in real estate contract on business property listed next above. Payable to Oregon Bank.	11,781	
(See Notes 1&2 below.)		
TOTAL LIABILITIES		$ 44,841
NET WORTH		$1,381,759

Note 1.

There are no contingent liabilities other than that related to the Clark, Marsh, Lindauer & McClinton mortgage and contract listed under liabilities. If there was a default by the other partners, I would be liable for the entire balance of $85,000 on the mortgage and $47,123 on the contract.

There are no legal claims, unpaid taxes or other special debts.

Note 2.

No assets are pledged.

I am not a defendant in any suits or legal action and I have never taken bankruptcy.

DATED: Feb 10, 1987

Malcolm F Marsh

Malcolm F. Marsh

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Discussion:

The criticism of judicial activism, as stated in this question, is too broad. There certainly are instances where the courts have stepped beyond dispute resolution into areas of legislation and administration, but such invasion of the jurisdiction of the other two branches of government is not wholesale. The fields of property law, probate, and contracts, for instance, have remained quite stable, with what changes that have occurred resulting from legislative enactments such as the varied uniform laws. The areas in which the criticism might be legitimate encompass consumer affairs and social ills. Thus the courts have been active in cases involving product liability, malpractice, investment protection, civil rights, rights of the accused, and the like. The fact that the courts have been active, however, does not necessarily mean their decisions have been wrong. It just raises the question of the appropriateness of acting at all. The blame, however, for this judicial activism (if there is any blame) cannot be laid at the feet of the judicial branch alone. Judicial activism has been encouraged by many.

Legislative action, promoted by bar associations and approved by the courts, has changed traditional procedural rules. These procedural changes have provided an atmosphere that encourages judicial activism, and even allows changes in substantive law. Traditional remedies of the court have been extended and expanded. There was something comfortable and simplistic in the old English system of specific causes of action. Each cause was assigned its own cubbyhole with specific remedies. If a dispute did not fit the mold, there was no claim. If the legislative branch wished to make a new mold it could do so. The courts, on the other hand, played a much more conservative role limiting new forms of relief. When inadequacies were found in the claims or relief available under the law, equity jurisdiction could allow extraordinary remedies.

Now, however, we have not only abolished the cause of action in some jurisdictions, but we have eliminated the distinction between Law and Equity as well. These developments have loosed the bonds, so to speak, to allow a person to claim that the result of any unfortunate event must give rise to a right of redress against someone else.

As a result, our society, manned with an army of attorneys, has found the court to be a convenient forum for advancing its various social causes. The legislative process is the appropriate way to present proposals for change. Under our Constitution, laws are enacted or amended by elected peers representative of the society. Likewise, under the Constitution, the "controversies" that may arise under those laws are to be resolved by the judicial branch. All too often, however, proponents of an idea can achieve their purpose more promptly by enticing the court to effect social change by judicial fiat, rather than by lobbying for the same end in the legislative branch.

All that is needed is a willing court and a representive client and claim that fulfills juridictional requirements. This way, the common law is improperly used to lead the parade for social change, rather than being allowed to respond in its normal evolutionary course to what the legislative branch has decided the law is to be.

Inspired by human willingness (or weakness) to favor some repair where nothing has been identified as wrong, the courts consciously feel they are doing their job. Unconsciously, they are violating the central theme of their existence, which is to resolve controversies by applying established law to established facts. Courts are often encouraged in this inappropriate activity by the very public and acedemic world that criticize their judicial activism. It just depends on which side of the issue a person is on whether he or she is a critic or proponent.

A good example of this situation is the incorporation of Section 402A of the Second Restatement of Torts into the common law of products liability. That rule was hardly a "restatement" of any existing statutory or case law. It was the creation of a commission which was comprised of reputable legal scholars. They were, however, neither elected representatives of the people, nor justices determining an existing dispute. Yet, Section 402A had a certain charm that found favor in a few courts at first, but eventually in many, often with different interpretations. Legislative action became necessary to bring some continuity and uniformity to the varied results reached by the courts. While the end result may be appropriate, ideally, the process should have been reversed.

Even in those instances in which the legislative branch has responded initially to institute new law, the courts have been encouraged to "legislate" amendments regarding scope and application. For instance, many were surprised to find modern RICO statutes applied to civil wrongs which had no relevance to the traditional concept of racketeering.

If the courts are to be criticised, it should be for succumbing to the pressure to cure every advocated ill. The common law has evolved from buggies to automobiles to airplanes and snowmobiles by applying the reasonable person standard. The courts should not, however, decide that the common law is the only source of reason available to set that standard. When the courts do so they not only preempt the jury system, but the legislative branch as well.

Who, during the patriotic fervor of World War II, would have imagined that the asbestos installation in Liberty and Victory Ships would be the seed of the most massive tort litigation the country has ever experienced? Yet, through the combined efforts of the courts and legislative bodies, our judicial system has been given the go ahead to, not only create new standards to govern industry today, but also to apply those same standards to expired personalities of the forties who were governed by altogether different standards and in some cases were responding to governmental insistence.

Statutes of Limitation which for years were accepted by the courts as a matter of legislative choice, are now regularly attacked as unfair or unconstitutional. Notice of claim has replaced the passage of time as the qualifying element. The concepts of stale proof, difficulty in presenting reliable evidence, and the need to ensure stability by laying old matters to rest, have all gone by the board.

Crowded prisons and open discrimination are real problems facing this nation. Whenever either problem is established in a court by parties to litigation, the courts should be quick to apply those remedies which exist under the law. This may be either damages under the law, or injunctive relief in equity. But the court should not be charged with, nor assume, the means of assuring humane conditions, nor setting the life styles of persons subjected to discriminatory practices. Instead, the relief available should be sure, swift and sufficient to convince the prison authorities and school districts in their administrative and legislative capacities to prevent the continuation of the wrong. Court supervised policing of the problem, while understandable in light of the pressure to do so, should be avoided under the doctrine of separation of powers.

The powers of our government are divided between the three branches, and no person charged with official duties within one of the branches should exercise the functions of another. While I do not believe that the separation of powers can ever be complete, the action of one branch of government should not be allowed to prevent, obstruct, or unduly burden the rightful action of another. Thus, while the legislative branch does regulate the courts to the extent statutes set forth the remedies and procedures for the courts, it should not be allowed to pass statutes determining how a court deliberates. The courts, on the other hand, regularly interpret legislative enactments, and review the executive authority of administrative proceedings. But the courts should not be able to void or amend a statute because it believes it to be inappropriate. I believe that this restriction of activity by one branch, upon the activity of another, is necessary to the practical performance of our system of checks and balances.

The courts should avoid rendering vain, moot, or nonbinding decisions. Thus, the standing of the parties, the presence of an active, or ripe, issue which is not moot, and the possibility of a purposeful decision estabishing the rights of the parties before the court are particularly important. This concern is constitutional in origin, as the courts are to consider only matters "in controversy." In other words, the court must have before it a controversy that lends itself to a judicial decision binding on identified parties. This is referred to as a justiciable controversy which is a necessary element in all forms of actions or suit.

Recent events have highlighted the sensitivity of all branches of government to not only be responsible to the performance of their individual duties, but to appropriately object to attempts by other branches to exercise functions belonging to another. With this in mind, however, the courts should be commended for their readiness to shake off the comfortable "way it was always done" syndrome that can impede necessary social change. The awakening of America to the fact that it was sleepily drifting with vast social inequities and discriminations called for all branches of government together with all citizens to institute change in attitude and action. The enactment of laws or the administration thereof can produce little progress unless it is accompanied by a change in public attitude. The courts are uniquely placed to change attitudes by responding with certain justice to those actions which can not be tolerated. I do not label such dispute resolution as activism, but rather justice fullfilling the very constitutional purpose for which the courts were created.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

Discussion:

I see my concerns for equal justice under the law and my efforts to provide pro bono legal services to the disadvantaged as entertwined. Pro bono legal service, to me, includes any service provided at no or reduced cost for the good of society. While that service is usually for an individual, its underlying principal is to assure the protection of the law for everyone. Therefore, providing legal services for disadvantaged people gives them access to the justice system that they might not otherwise have.

There are two different aspects of my lifestyle that I believe promote equal justice under the law and provide pro bono services. Those aspects involve the way I spend my professisonal time, and how I live my personal life. Pro bono services and equal justice do not merely involve the voluntary promotion of civil rights cases or defense of criminal matters. More often, pro bono work is writing a will or reviewing a contract for free for someone who is financially strapped. Further, pro bono work includes service for community programs and organizations. Therefore, for me to discuss my activities promoting these concepts I must do so in the framework of my individual philosophy of life. It is difficult for me to discuss accomplishments as I feel that smacks of pride. I do not do pro bono work for notoriety, but for personal fulfillment and to give to a community that has provided well for me.

I feel that a lawyer's responsibility extends far beyond court appearances and client conferences. An attorney should look upon the profession as a calling. The call is to uphold the law in its application to all people and champion that cause at all times. As a calling, the profession should permeate every aspect of a lawyer's life. Therefore, I believe it is my responsibility to be an example to all the people I encounter in in my personal, family, business, social, and public life.

As a married couple, my wife and I have a responsibility to be examples to our children and acquaintances of the historical, traditional, and legal values which are the source of our liberty. Part of this responsibility is to uphold basic human rights including the right to equal protection under law. In exhibiting our values as part of our lifestyle, we have been active in Boy Scouts, Young Life, church groups, school events, civic projects, and community development. I accepted the honor I received as Salem First Citizen of 1982 as an award to be shared with the many people who have worked to improve Salem as a community.

In my law practice, I have concentrated on preserving ethical values. In hiring associates, training clerks, and handling files, I have stressed that the legal profession is a calling of confidence that requires us to be reliable and trustworthy, not only to clients, but to other counsel, the courts, and society as a whole. This requires us to have as our motivating purpose the service to others, rather than personal gain.

Throughout my career all members of my firm have responded to the requests of the court and bar to voluntarily serve. Several times we provided criminal defense without fee or at a drastically reduced fee. At one time the county finances were so low that the court had to call upon the attorneys to assist in many functions aside from criminal defense. Most attorneys, including my firm, responded without limitation. Service on committees and boards dealing with indigent legal services has been standard among the lawyers in my firm.

I believe that I took part in the first meeting ever held in Oregon regarding the creation of a Legal Aid Society. There was a lot of confusion over what that could or should entail, but it was based upon the central theme of making legal services available to all.

I am frank to say that, although I believe that the disadvantaged should have available some means of locating legal services, I do not agree with lawyer advertising. I believe that advertising is marketing, not serving. I often have people call me for advice who found me through others I had served. I can usually tell which ones are in need and spend the time necessary for a reduced fee or without pay. All the advertisements I have seen offered work for pay.

I have helped others besides those in financial difficulty on a pro bono basis. I have counseled many acquaintences and strangers with domestic problems with the sole purpose of trying to preserve a marriage. For several years I was on a panel sponsered by the YMCA to meet with people with domestic, financial, emotional, and business problems. All members of the panel were volunteers.

Although there have been times when I have declined to represent someone, I never refuse to hear their problem, unless it involves a conflict of interest. If I turn the matter down, it is because I do not feel qualified to handle it, or for time or some other reason I do not feel I will be able to give it my best effort. I have never charged for such a conference.

My voluntary service on civic boards, commissions, committees, and as a hospital trustee, has been in response to my belief that each member of society is responsible to provide for the needs of the other people. When an attorney does so it helps promote the theme that the judicial process and its members are involved for all people.

All this may sound idealistic and unrealistic to some. I believe, however, that if the legal profession is indifferent to the problems of society that it is uniquely qualified to help solve, it should not be surprised to receive the scorn and criticism of a society that innately expects it to behave more appropriately.

Part of promoting equal protection lies in maintaining an ethical bar. Justice can be denied just as completely by the incompetence, misconduct, or greed of an attorney, as it can by prejudice and insensitivity. For this reason I served for many years upon the local grievence committee to examine complaints regarding the conduct of attorneys. In addition, I served for years on the Disciplinary Procedure committee of the Oregon State Bar Association to promulgate efficient rules for the handling of such claims. Part of this service involved counselling of young attorneys, appearing at ethics classes in law schools, and being available to other attorneys who had questions about their work.

There are no statistics to measure the success or failure of this activity, but I sense that it has done some good. I have been blessed with some success that has allowed even more time for this part of my profession, and I hope that the opportunities will be even greater in the future.

NEVA · 2/6/87

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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: MALCOLM F. MARSH
United States District Court
for the District of Oregon

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Malcolm F. Marsh for appointment as Judge of the United States District Court for the District of Oregon.

Our Committee is unanimously of the opinion that Mr. Marsh is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

MORTON I. GREENBERG

Birth:	March 20, 1933	Philadelphia, Pennsylvania
Legal Residence:	New Jersey	
Marital Status:	Divorced	Three children
Education:	1950 - 1954	University of Pennsylvania B.A. degree
	1954 - 1957	Yale University Law School J.D. degree
Bar:	1958	New Jersey
Experience:	1957 - 1960	Attorney General's Office for New Jersey Law Clerk (1957-1958) Deputy Attorney General (1958 - 1960)
	1960 - 1962	Charles W. Sandman, Esq. Associate
	1962 - 1971	Private Practice Cape May, New Jersey
	1971 - 1973	Assistant Attorney General State Attorney General's Office
	1973 - 1976	Superior Court Judge, Law Division Middlesex County Court
	1976 - 1980	Superior Court Judge, Chancery Division
	1980 - present	Superior Court Judge, Appellate Division
Office:	Richard Hughes Justice Complex CN 969 Trenton, New Jersey 08625 609 984-0483	
Home:		

To be United States Circuit Judge for the Third Circuit

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used).

   Morton Ira Greenberg.

2. Address: List current place of residence and office address(es).

   Residence: 1309 Bradley Court, Princeton, New Jersey 08540. While my mailing address is in Princeton, the municipality in which I reside is South Brunswick Township.

   Office: Richard J. Hughes Justice Complex, CN 969, Trenton, New Jersey 08625.

3. Date and place of birth.

   March 20, 1933, Philadelphia, Pennsylvania.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   I was divorced in 1982. I am still unmarried but I am engaged to be married to Dr. Barbara Ann Kissel-Hoyler, a clinical psychologist, of 35 Finley Road, Princeton, N.J. 08540. Dr. Hoyler is a clinical psychologist consultant to Community Life Services, 800 Chester Pike, Sharon Hill, Pennsylvania and to the Diocese of Trenton, Catholic Welfare Bureau, 47 N. Clinton Ave., Trenton, N.J.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   I attended the University of Pennsylvania as an undergraduate from 1950 to 1954 and graduated with an A.B. degree. I attended Yale Law School from 1954 to 1957 and graduated with an LLB, later converted to a J.D.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   After I graduated from college I attended law school full time and was not employed until I graduated law school except that in the summer of 1956 I was employed as a law clerk by a law firm, Wolf, Block, Schorr and Solis-Cohen in Philadelphia, Pennsylvania. After graduating law school I was employed by the attorney general of New Jersey in Trenton as a law clerk and ultimately as a deputy attorney general until the summer of 1960. From the summer of 1960 until March 1962 I was employed by Charles W. Sandman, Jr. in his law office in Cape May, N.J. After that I ran my own office in Cape May until November 1971. From the fall of 1967 until November 1971 I employed John Ludlam as an associate. In November 1971 I left private practice and became assistant attorney general of New Jersey in charge of all civil litigation of the State of New

Jersey. In December 1973 I left the attorney general's office and became a judge of the Superior Court of New Jersey, a position I still hold. I have never engaged in any business or profession except the practice of law. I was never the director or officer of any corporation in which I was active except that I owned a 50% interest in the corporation owning the building in which I had my law office, Washington Mall, Inc., from about 1971 until about 1973 when I sold it. I believe I was president of that corporation. At one time I served as president of the Cape May City Chamber of Commerce and for several years was treasurer of the Cape May Kiwanis Club. In addition, I served as a trustee of a Jewish Congregation in Wildwood, N.J. I cannot remember the years I held these offices.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I was a member of the Board of Editors of the Yale Law Journal, a position I achieved on the basis of class standing at the end of my first year of law school. I think I graduated college with honors but I am not sure of this.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

In the past I have been a member of the Cape May County and Hunterdon County Bar Associations. I am currently a member of the New Jersey, Mercer County and Princeton Bar Associations. I have never been an officer of these associations. I am a member of the Yale Law School Association of New Jersey and have been a trustee for many years. As a judge I have been an instructor at the annual New Jersey Judicial College and have spoken at education programs for attorneys including programs conducted by the New Jersey State Bar Association, the American Trial Lawyers Association and the New Jersey Institute for Continuing Legal Education. In addition, I have been a lecturer at the annual conference of the New Jersey administrative law judges.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

I belong to no lobbying bodies. The only organization (other than bar associations) in which I am active is the Nassau Racquet Club, a tennis club in Belle Mead, N.J. I want to point out that state judges in New Jersey are greatly limited by ethics rules in participating in public matters.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

I was admitted to the bars of the New Jersey State Courts and the United States District Court in New Jersey in 1958. I was admitted to the bars of the United States Court of Appeals for the Third Circuit in 1972 and the United States Supreme Court in 1973. Sometime during the 1960's I was admitted to the bar of the Tax Court of the United States.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

As of September 1986 I had published 131 court decisions as a state court judge in New Jersey. Of these 122 were signed and 9 were per curiam. Of course I am continuing to write published opinions. I think it appropriate to point out that I write my own opinions and do not have clerks write them. I personally examine the record and all cases, statutes and other authorities in every case in which I write the opinion. Thus my opinions are really my product. I also do considerable research myself as we receive memoranda from clerks or our central research staff in only about one-half of our cases. In New Jersey only a small percentage of Appellate Division opinions are published. Overall my Appellate Division opinions, including unreported decisions, fill thirteen large volumes. In addition I served as a commissioner on the New Jersey Riparian Lands Study Commission in the early 1960's and wrote part of its report. As a member of the Board of Editors of the Yale Law Journal I wrote a note, the Independent Liability Rule as a Bar to Interpleader in the Federal Courts, 65 Yale L.J. 715 (1956) and a comment, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204 (1956). I was co-chairperson and co-editor with Robert F. Blomquist, Esq. of the New Jersey Appellate Practice Handbook (1984), published by the New Jersey Institute for Continuing Legal Education. This handbook is a practical guide to attorneys helping them with procedural aspects of appeals. Mr. Blomquist is now a member of the faculty at Valparaiso University Law School in Indiana.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is excellent. In fact since becoming employed by the State of New Jersey in 1971, I have only missed two days of work by reason of illness. I had a complete physical examination on June 27, 1986 supplemented by eye and ear examinations on August 9, 1986 and a blood pressure examination which was normal on September 15, 1986. The doctor confirmed my good health and discharged me until my next regular check-up.

14. Judicial Office (if applicable): State (chronologically) any judicial office you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed by Governor William Cahill to the Superior Court of New Jersey in December 1973 and was reappointed by Governor Brendan Byrne in 1980. I served as a judge of the Law Division in Middlesex County from when I was appointed until August 1976, when I was reassigned by Chief Justice Richard J. Hughes to the Chancery Division. From about May 1975 until August 1976 I was acting assignment judge in Middlesex County.

The assignment judge is the chief judge of all the trial courts in the county and as acting assignment judge I performed this function when the assignment judge was unavailable or on vacation. From August 1976 until February 4, 1980 I was the judge of the Chancery Division, General Equity causes, for Mercer, Somerset and Hunterdon Counties. On February 4, 1980 I was reassigned by Chief Justice Robert Wilentz to the Appellate Division and I am now presiding judge of Part F on that court. The assignments as acting assignment judge and to the Chancery Division and Appellate Division may reasonably be regarded as promotions.

Judges of the Superior Court are appointed by the Governor with the advice and consent of the Senate. The Chief Justice makes assignments within the court. My initial appointment was for seven years. Upon reappointment in 1980 I received tenure subject to mandatory retirement at the age of 70. The Law Division has original jurisdiction over criminal and general civil matters similar to the common law courts. However, my particular assignment was largely to hear civil cases though I also heard criminal cases when the defendant was a prominent person or when the charge involved a homicide. The Chancery Division, General Equity causes, has jurisdiction over all equity nonmatrimonial matters. In addition to my judicial duties while a Chancery Division judge I also had the administrative duty of approving all disbursements from the trust account maintained by the Clerk of the Superior Court for the entire state. The Appellate Division has jurisdiction over all appeals from the trial divisions except when the death penalty has been imposed. In those capital cases appeals go directly to the Supreme Court. The Appellate Division also hears appeals from State administrative agencies.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Any selection of the ten most significant opinions I have written tends to be arbitrary. In fact, as I have indicated I had published 131 opinions by September 1986. I believe that my number of published opinions is one of the highest, if not the highest, in the State among appellate judges during the period I have been on the Appellate Division. After due consideration I have selected the following ten. In compiling this list of significant opinions I have not included opinions on constitutional law as they are listed separately.

(1) Essex Bank v. Capital Resources Corp., 179 N.J. Super. 523, 432 A.2d 936 (App. Div. 1981), certif. den. 88 N.J. 495, 443 A.2d 710 (1981). The court rule permitting a party who offers to take a judgment in his favor to recover counsel fees, when the offer is rejected and the offeror obtains a determination as favorable as the offer, cannot be used by a defendant in a civil action who offers to take a dismissal and who obtains a dismissal when the offer is not accepted. This is because the rule if so used would have the serious consequence of penalizing plaintiffs losing law suits as

defendants upon being served with process will automatically offer to accept a dismissal.

(2) *Polistina v. Polistina*, 183 *N.J. Super*. 291, 443 *A*.2d 1086 (App. Div. 1982). When two plaintiffs may be individually guilty of contributory negligence it is reversible error to aggregate their percentages of negligence in a comparative negligence case as their total percentage of negligence may exceed the percentage of negligence attributable to a defendant and thereby cause each to receive a no cause for action whereas if each plaintiff's negligence is considered separately each might recover.

(3) *Rockaway v. Donofrio*, 186 *N.J. Super*. 344, 452 *A*.2d 694 (App. Div. 1982). A public agency condemning property must strictly comply with the statutory prerequisites to condemnation. A failure to comply will result in a dismissal of the case.

(4) *Ehrenworth v. Ehrenworth*, 187 *N.J. Super*. 342, 454 *A*.2d 895 (App. Div. 1982). Notwithstanding a statute terminating alimony upon remarriage of the payee, the parties may by agreement provide for the alimony to survive the remarriage.

(5) *State v. Phelps*, 187 *N.J. Super*. 364, 454 *A*.2d 908 (App. Div. 1983), aff'd 96 *N.J.* 500, 476 *A*.2d 1199 (1984). New Jersey will follow the federal rule that a jury need not be instructed that before it may consider a statement of a co-conspirator against a defendant it must find that the conspiracy existed without the statement.

(6) *Steinel v. Jersey City*, 193 *N.J. Super*. 629, 475 *A*.2d 640 (App. Div. 1984), aff'd 99 *N.J.* 1, 489 *A*.2d 1145 (1985). When an employee in the classified civil service is discharged but on administrative appeal has his punishment reduced to the maximum statutory suspension period of six months, he must be awarded mitigated back pay for the period beyond six months prior to his actual reinstatement, as denial of such pay would amount to a *de facto* suspension for longer than the six months maximum suspension period allowed by the statute.

(7) *Saunderlin v. E.I. du Pont Co.*, 199 *N.J. Super*. 145, 488 *A*.2d 1046 (App. Div. 1985), aff'd 102 *N.J* 402, 508 *A*.2d 1095 (1986). Under the 1979 amendments to the Workers' Compensation Act, which were intended to narrow the types of partial, permanent disability for which an award could be made but to increase the size of the awards in cases of serious injury, in a psychiatric injury case no recovery can be allowed unless there is demonstrable objective medical evidence of the disability.

(8) *Red Bank Register v. Board of Educ.*, 206 *N.J. Super*. 1, 501 *A*.2d 985 (App. Div. 1985). Curriculum reports made on behalf of a school board are public records subject, upon appropriate findings, to the common law right of inspection by the public.

(9) *Pierzga v. Ohio Cas. Group of Ins. Companies*, 208 *N.J. Super*. 40, 504 *A*.2d 1200 (App. Div. 1986), certif. den. ___ *N.J.* ___, ___ *A*.2d ___ (1986). Punitive damages may not be awarded a plaintiff wrongfully denied personal injury protection benefits under the New Jersey No Fault Automobile

Act nor may the plaintiff be awarded treble damages under the Consumer Fraud Act as such damages would grant a plaintiff a windfall at the expense of the premium paying public and are not authorized by the No Fault Act.

(10) State v. Burks, 208 N.J. Super. 595, 506 A.2d 779 (App. Div. 1986). A jury charge in a criminal case in which a defendant raises self-defense as an issue is prejudicial when the judge places the burden of proof of a fact to support the defense on the defendant as the State must negate the defense when properly raised. Accordingly a conviction entered following such a charge must be reversed.

As I have indicated I served as a trial judge from 1973 until 1980. Appeals from the trial courts in New Jersey go to the Appellate Division of the Superior Court. Very few trial court opinions are published in New Jersey and even only a small percentage of Appellate Division opinions are published. Consequently, it is impossible from the examination of published reports in New Jersey to determine which trial judges were reversed in which cases. Unfortunately I do not have a record of the disposition of my trial court decisions on appeal. I have been advised by the Clerk of the Appellate Division that her records will not permit development of a trial judge's record on appeal. Accordingly, it is impossible for me to supply the Committee with a summary of all appellate opinions reversing any trial court decision I rendered. I can, however, represent without hesitation that the vast majority of cases on which I sat as a trial judge did not generate an appeal and in the cases in which there was an appeal the large majority were affirmed.

I have not kept a record of the disposition in the Supreme Court of New Jersey of appeals of cases from the Appellate Division in which I have written the opinion. I have discussed this matter with the clerk of the Supreme Court of New Jersey and he advises me that the records of that court do not permit identification of the judges of the Appellate Division who have written opinions which are reversed as most Appellate Division decisions are unsigned and are filed per curiam. However, inasmuch as all or almost all Supreme Court dispositions are reported I have been able to reconstruct my record on appeals in the Supreme Court of New Jersey by going through the Supreme Court Reports from 1980 when I was assigned to the Appellate Division to the present. While most of my opinions as an Appellate Division judge are unreported, I nevertheless have recognized the Supreme Court cases taking up opinions I have written. Accordingly while it is possible that I have missed a case I have attempted to set forth a complete list. Insofar as I am aware I have never had a decision reversed by the Supreme Court of the United States.

Supreme Court of New Jersey decisions reversing my Appellate Division decisions are as follows:

(1) Haynes v. First Nat'l State Bk. of N.J., 87 N.J 163, 432 A.2d 890 (1981) (an action involving a will and dealing with undue influence and confidential relationships).

(2) Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983) (an action concerned with the valuation of a law practice for purposes of equitable distribution).

(3) Boss v. Rockland Elec. Co., 95 N.J. 33, 468 A.2d 1055 (1983) (this case determines the jurisdiction of the Board of Public Utilities in considering the rights of a utility to use an easement).

(4) State v. New Jersey Trade Waste Ass'n, 96 N.J. 8, 472 A.2d 1050 (1984) (an indictment dismissed by trial judge who we affirmed was reinstated by the Supreme Court).

(5) Trus Joist Corp. v. Treetop Associates, Inc., 97 N.J. 22, 477 A.2d 806 (1984) (an exceptionally complicated case involving rights under the bankruptcy act and the legal consequences of a lis pendens).

(6) Negrotti v. Negrotti, 98 N.J. 428, 487 A.2d 328 (1985) (the effect of a stipulation of valuation in a divorce action and the court's right to modify it).

(7) Newark Superior Officers Ass'n v. City of Newark, 98 N.J. 212, 486 A.2d 305 (1985) (action determining whether a statute permitting certain municipalities, but not all, to appoint a chief of police outside of ordinary civil service procedures was special legislation).

(8) Berman v. Valley Hosp., 103 N.J. 100, 510 A.2d 673 (1986) (action concerning the validity of a restrictive rule regarding admission of physicians to a hospital staff).

(9) Rivera v. Prudential Property and Cas. Ins. Co., 104 N.J. 32, 514 A.2d 1296 (1986) (an action dealing with the time limits for bringing claims for personal injury protection benefits under the New Jersey No Fault Act).

The modifications and partial reversals were in the following cases:

(1) In re IFPTE Local 195 v. State, 88 N.J. 393, 443 A.2d 187 (1982) (action concerning the scope of collective bargaining for public employees meaning what matters are not subject to negotiation).

(2) In re Trantino Parole Application, 89 N.J. 347, 446 A.2d 104 (1982) (appeal concerning application of parole act, basis for parole and provisions for restitution in connection with parole).

(3) N.J. Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983) (appeal concerning right of inmate to accelerated parole and the circumstances in which he may be limited in the benefit given by a liberalizing parole eligibility statute).

(4) Dickinson v. Fund for Support of Free Public Schools, 95 N.J. 65, 469 A.2d 1 (1983) (action involving construction and validity of constitutional amendment requiring the State to map its riparian land claims).

(5) State v. R.W., 104 N.J. 32, 514 A.2d 1287 (1986) (appeal of conviction in a sexual abuse case).

My record as an appellate court judge is only meaningful when compared to the total number of cases in which I have written the opinion. The Clerk of the Appellate Division has advised me that as of September 1986 I was credited with 1233 opinions from February 4, 1980, when I went on the Appellate Division, until that time. Actually this figure is low as it does not include summary dispositions entered on motion of a party and thus not placed on a regular calendar. I have calculated that 1010 of the opinions were formal. The balance were summary dispositions placed on calendars devoted to reviewing sentences. Inasmuch as the opinions I listed showing partial reversals and modifications included aspects, sometimes predominant, affirming the decisions I wrote, a reasonable estimate of the reversal rate of my appellate decisions is one per cent. As must be obvious from the statistics, the Appellate Division is an extremely high volume court. In fact in one court year I wrote 179 formal opinions not including summary dispositions. It should also be understood that I participated in a large number of other cases where other judges wrote the opinions. In addition to writing opinions we deal with large numbers of motions and emergency applications as well as administrative matters. As a presiding judge I, of course, have special administrative duties. Further, as the senior Appellate Division judge in Trenton, the location of the Clerk's office, I have other administrative duties.

I have written many opinions involving constitutional questions, most of which are unreported. Frequently in criminal cases constitutional questions are raised involving the adequacy of representation by defense counsel, admissibility of statements given by defendants, validity of searches, suggestiveness of line-ups, reliability of identifications and other issues. The Committee, however, asks for citations for "significant" opinions and thus I assume that the Committee does not want a description of every constitutional decision I have written but rather is concerned with cases of precedential value. Accordingly, I answer the question on that basis and only list reported opinions. To the best of my knowledge I have listed every reported opinion I have written on constitutional law except for N.J. Parole Bd. v. Byrne, 182 N.J. Super. 540, 442 A.2d 1032 (App. Div. 1982) and Newark Superior Officers Ass'n v. Newark, 187 N.J. Super. 390, 455 A.2d 81 (1982). I omitted these two cases as they cannot be regarded as significant as the former was substantially modified and the latter was reversed by the Supreme Court of New Jersey as set forth above. Thus my listing gives a complete view of my opinions in that field.

(1) Van Ness Industries v. Claremont Painting, 129 N.J. Super. 507, 324 A.2d 102 (Ch. Div. 1974). The distraint for rent law is unconstitutional as it denies the tenants procedural due process of law. I wrote this opinion in the summer of 1974 when I filled in for the Chancery judge who was on vacation.

(2) In re Estate of Sharp, 151 N.J. Super. 579 (Ch. Div. 1977), mod. and aff'd 163 N.J. Super. 148 (App. Div. 1978). New Jersey law providing that a child born out of wedlock shall be treated as legitimate as to his maternal ancestors but not as to his paternal ancestors denies equal protection of the law. In view of the expanding legislative condemnation of discriminatory practices, the remedy upon the finding of unconstitutionality will be to permit the child to inherit the intestate estate of both of his parents rather than not to allow him to inherit from either of them.

(3) *Sheeran v. Nationwide Mutual Insurance Co., Inc.*, 159 *N.J. Super*. 417, 388 *A*.2d 272 (Ch. Div. 1978), aff'd 163 *N.J. Super*. 40, 394 *A*.2d 149 (App. Div. 1978), mod. and aff'd 80 *N.J*. 548, 404 *A*.2d 625 (1979). Mandatory requirement that an insurance company renew coverage is constitutional.

(4) *Whippany Paper Board Co. v. Alfano*, 176 *N.J. Super*. 363, 423 *A*.2d 648 (App. Div. 1980). This case held that in private civil litigation a judge could not require a witness properly claiming the privilege against self-incrimination to testify simply by creating a type of judicial use immunity and granting it to the witness.

(5) *Branch Brook Gardens v. Belleville Rent Lev. Bd.*, 177 *N.J. Super*. 1, 424 *A*.2d 840 (App. Div. 1980). A rent control ordinance which allows but does not require a landlord to charge rents which will produce an unreasonably high rate of return cannot be challenged by a tenant on constitutional grounds as a municipality is not required to have a rent control ordinance.

(6) *Enourato v. N.J. Building Authority*, 182 *N.J. Super*. 58, 440 *A*.2d 42 (App. Div. 1981), aff'd 90 *N.J*. 396, 448 *A*.2d 449 (1982). Debt limitation clause in the State Constitution is not violated by establishment of an authority to issue bonds and rent space to the State as the bonds are payable solely from the revenues and are not a debt of the State.

(7) *State v. Sanders*, 185 *N.J. Super*. 258, 448 *A*.2d 481 (App. Div. 1982). Casino employees are employed by private businesses and thus are not regarded as state agents for purposes of determining constitutionality of search.

(8) *Dickinson v. Fund for Support of Free Public Schools*, 187 *N.J. Super*. 224, 454 *A*.2d 491 (App. Div. 1981), aff'd in part, rev'd in part 95 *N.J*. 65, 469 *A*.2d 1 (1983). Constitutional amendment requiring State to set forth its claims, if any, to riparian lands construed and upheld.

(9) *Hupp v. Accessory Distributors, Inc*., 193 *N.J. Super*. 701, 475 *A*.2d 679 (App. Div. 1984). In an action on a judgment from another state, the full faith and credit clause does not require a New Jersey court to enforce the foreign judgment without an inquiry into the jurisdiction of the foreign court in a situation in which the defendant appeared in the foreign court but was precluded from contesting jurisdiction.

(10) *Albano v. Mayor & Tp. Com. of Tp. of Wash*., 194 *N.J. Super*. 265, 476 *A*.2d 852 (App. Div. 1984). A zoning ordinance requiring three acre lots for valid ecological and environmental reasons does not unconstitutionally take a developer's property even though in the circumstances of the case the developer will not be able to develop the property profitably.

(11) *First Jersey Securities, Inc. v. S.E.C.*, 194 *N.J. Super*. 284, 476 *A*.2d 861 (App. Div. 1984), app. dism. 101 *N.J*. 208, 501 *A*.2d 893 (1985). A state court may *not* enjoin the Securities and Exchange Commission from conducting a hearing as this would violate the Supremacy Clause of the United States Constitution.

(12) Seton Co. v. City of Newark, 194 N.J. Super. 499, 477 A.2d 397 (App. Div. 1984), certif. den. 99 N.J. 152, 491 A.2d 667 (1984). An ordinance establishing sewerage charges based on water usage, though placing an increased burden on large users, is constitutional as a contrary holding would require small users, frequently homeowners of modest means, to subsidize businesses, a result to be avoided in the City of Newark because of the economic conditions there.

(13) Manetti v. Prudential Property & Cas. Ins. Co., 196 N.J. Super. 317, 482 A.2d 520 (App. Div. 1984). There is no constitutional right to a jury trial in an action for personal injury protection benefits provided in an automobile insurance policy as the cause of action for the benefits is statutory and jury trials will delay resolution of any controversy to the detriment of the claimants who need reimbursement for medical expenses and loss of income. Further, if a jury trial could be demanded in such cases there would be doubt as to the validity of recent changes in the No Fault law providing for binding arbitration of claims for benefits.

(14) State v. Genesis Leasing Corp., 197 N.J. Super. 284, 484 A.2d 1263 (1984). The Commerce Clause permits New Jersey to require Pennsylvania truckers to register solid waste vehicles in New Jersey to obtain benefits under New Jersey law.

(15) State v. Jordan, 197 N.J. Super. 489, 485 A.2d 323 (App. Div. 1984). When a witness appears likely to claim a Fifth Amendment privilege not to testify and, because of his relationship with the defendants, is thereby likely to create an inference he is protecting them, the court should hold a hearing outside of the presence of the jury to ascertain his intentions to avoid prejudicing the defendants by a claim of privilege of the witness before the jury. The failure to do so requires the reversal of a murder conviction when the witness in the presence of the jury refuses to testify.

(16) State v. Vujosevic, 198 N.J. Super. 435, 487 A.2d 751 (App. Div. 1985), certif. den. 101 N.J. 247, 501 A.2d (1985). Even if it is assumed that the failure of a court to charge a lesser included offense when the evidence justifies the charge is ordinarily reversible error of constitutional dimension, if the court is able to determine beyond a reasonable doubt that the error was harmless a reversal will not be required.

(17) Windman v. City of Englewood, 200 N.J. Super. 218, 491 A.2d 32 (App. Div. 1985). Provisions of a rent control ordinance do not impair a landlord's contract and do not deny the landlord substantive due process merely because they require a rent rollback.

(18) State v. Hollander, 201 N.J. Super. 453, 493 A.2d 563 (App. Div. 1985), certif. den. 101 N.J. 335, 501 A.2d 983 (1985). A defendant in a criminal case has no right under the Sixth Amendment to have the results of a polygraph examination admitted into evidence even if favorable unless the parties have clearly stipulated as to the admissibility of the results.

(19) State v. Medina, 201 N.J. Super. 565, 493 A.2d 623 (App. Div. 1985), certif. den. 102 N.J. 298, 508 A.2d 185 (1985). Notwithstanding the enactment in the New Jersey Code of Criminal Justice of a statutory entrapment defense, a defendant may raise an independent due process/fundamental fairness defense to an indictment predicated on the misconduct of the police in supplying narcotics even though the defendant does not establish statutory entrapment.

(20) State v. Childs, 204 N.J. Super. 639, 499 A.2d 1041 (App. Div. 1985). Even if it is assumed that a defendant has a constitutional right to be present during deliberations when a jury asks a question, if the question simply asks whether a deadlocked jury should continue to deliberate, there is no ground for reversal when the defendant only desired to be present to urge that there be a mistrial as the purpose of a trial is to obtain a verdict not a mistrial.

(21) In the Matter of N.J.A.C. 11:1-20, 208 N.J. Super. 182, 505 A.2d 177 (App. Div. 1986), certif. den. ___ N.J. ___, ___ A.2d ___ (1986). An administrative rule limiting insurance companies' rights to cancel policies was valid and violated no constitutional rights of the companies as the rule was justified because of a state-wide crisis in which insureds were losing their coverage.

(22) State v. Loyle, 208 N.J. Super. 334, 506 A.2d 9 (App. Div. 1986). When a defendant charged with a nonindictable offense of driving under the influence of alcohol and an indictable offense of causing a death by the reckless driving of an automobile as the result of one incident pleads guilty to the nonindictable offense over the prosecutor's objection that the court not proceed solely on the nonindictable offense, double jeopardy protections do not preclude a subsequent trial of the indictable offense.

(23) Anastasio v. Planning Board of West Orange, 209 N.J. Super. 499, 507 A.2d 1194 (App. Div. 1986), certif. den. ___ N.J. ___, ___ A.2d ___ (1986). Planning board members are absolutely immune from liability under 42 U.S.C. §1983 when performing the quasi-judicial function of passing upon a site plan application. Inasmuch as delay in approval of an application will result in its automatic approval under state law, a developer's constitutionally protected property interests are not infringed by a planning board's delay in considering the application.

(24) State v. Chappee, 211 N.J. Super. 321, 511 A.2d 1197 (App. Div. 1986), certif. den. ___ N.J. ___, ___ A.2d ___ (1986). A defendant has no absolute Sixth Amendment right to representation by out-of-state counsel when a member of the local bar is able to provide him with effective representation. Accordingly a judge in denying admission *pro hac vice* of three attorneys from three different foreign jurisdictions because of scheduling difficulties did not commit reversible error.

(25) State v. Darby, 211 N.J. Super. 367, 511 A.2d 1222 (App. Div. 1986), certif. den. ___ N.J. ___, ___ A.2d ___ (1986). When an indicted defendant in custody initiates a conversation with the police and effectively waives counsel after being given

Miranda warnings, his statement will be admissible at least if he is not yet represented by counsel when he makes it.

(26) State v. Cohen, 211 N.J. Super. 544, 512 A.2d 500 (App. Div. 1986). The death qualification of a jury in a capital case under the new law reinstating the death penalty does not violate the New Jersey Constitution as the Supreme Court of New Jersey under prior law approved death qualification even on the phase involving only determination of guilt. Thus New Jersey will adhere to the decision of the Supreme Court of the United States in Lockhart v. McCree, ___ U.S. ___, 106 S. Ct. 1758, 90 L.Ed.2d 137 (1986), on this point and will allow death qualification.

(27) NYT Cable TV v. Homestead at Mansfield, decided November 19, 1986, to be published. The Cable Television Act and the administrative rule implementing it are constitutional insofar as they provide that a cable operator may place his facilities in a development for a presumed consideration of $1.00 as the rules allow the developer to show greater damage.

(28) Tyhimba v. N.J. State Parole Board, 214 N.J. Super. 62, 518 A.2d 497 (App. Div. 1986). Under the Parole Act of 1979 and N.J. Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983), when there is a dispute over the details of an inmate's offense and the prosecutor asserts that the inmate is entitled only to a one-half step reduction of his advanced parole eligibility date because the punitive aspects of the sentence have not been fulfilled, there is no constitutional requirement that a hearing be held on the matter.

(29) Fidelity Union Bank v. Hyman, decided December 8, 1986, to be published. Notwithstanding New Jersey precedent establishing that a civil action will not be stayed merely because a criminal action is pending against a party and further providing that a plaintiff's complaint will be dismissed if he pleads the privilege against self-incrimination to limit discovery against him, when a defendant-third party plaintiff's third party complaint has been dismissed because he pleaded the privilege against self-incrimination at a deposition, it may be reinstated when he subsequently waives the privilege and agrees to testify provided he does so promptly and while the original complaint is still pending.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have held various public offices, all appointed. My only full-time nonjudicial positions were those in the attorney general's office as already set forth in the answer to question six. While in private practice of law in Cape May, New Jersey, I held various part-time positions. Those I now recall include attorney for the Township of Lower from January 1, 1964 until November 8, 1971, Cape May County attorney from June 1970 until June 1971 and first assistant county prosecutor from June 1971 until November 8, 1971. In New Jersey the county attorney is the civil lawyer for the county government and the county prosecutor handles criminal prosecutions. I also served three years in the late 1960's as attorney for the Township of Dennis and represented other public agencies including school boards, the Housing Authority of Cape May City and the Zoning Board of Adjustment of the City of Sea Isle City. Because of the long lapse of time I can no longer remember the dates of these various representations. In addition, I frequently served as special counsel for other municipalities and public agencies, particularly in litigation. See, e.g., Steger v. Schellenger, 33 N.J. 293, 163 A.2d 377 (1960); Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968). I did contemplate running for the general assembly in 1967 but I withdrew without having filed a petition to get on the ballot so I cannot claim I ever ran for public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practice alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

I never served as a judicial clerk. When I was graduated from law school I clerked in the office of the attorney general of New Jersey until I was admitted to the bar in August 1958. The long delay in my admission was attributable to clerkship requirements that were then a prerequisite to taking the bar as I passed the bar the first time. After I passed the bar I continued working in the attorney general's office, Division of Law, in Trenton. I intended to practice in Trenton privately and formed a partnership with Stephen Lichtenstein, Esq. for that purpose but instead decided to practice in Cape May, New Jersey. The Trenton partnership was never active.

In June 1960 I was employed by Charles W. Sandman, Jr., Esq. at 421 Washington Street, Cape May, New Jersey in a two-person practice. I left Mr. Sandman in March 1962 and practiced alone at the same address, but in a different office, until the fall of 1967 when I employed John Ludlam, Esq. in a two-person practice at the same address. I continued practicing law with Mr. Ludlam until November 8, 1971.

In November 1971 I became assistant attorney general in charge of all civil litigation of the State of New Jersey in the office of the attorney general, Department of Law and Public Safety, Division of Law, Trenton, New Jersey. The organization of the

Division of Law was as follows. It was headed by a first assistant attorney general who was primarily involved in administration. There were three assistant attorneys general respectively in charge of appeals, civil litigation (trials) and advice. The Division of Law is responsible for the civil representation of the State government. Criminal matters are handled in the Division of Criminal Justice.

As assistant attorney general in charge of civil litigation I supervised all civil litigation of the State and insofar as they were engaged in civil litigation all of the approximately 120 deputy attorneys general in the Division of Law were under my supervision. (In New Jersey the federal ranking of deputy and assistant attorney general are reversed.) As supervisor I consulted continuously with the deputies, who though very able were often inexperienced. I reviewed all lawsuits started against the State and its departments and employees except for actions in which the State was a party only because of a lien claim. I also reviewed many actions in which the State was the plaintiff. In addition, I personally tried, either alone or as lead counsel, many of the most significant cases involving the State in both federal and state courts. In a typical day I would drive to a court somewhere in New Jersey, try a case all day and then work in the office at night reviewing materials submitted to me and dictating into a machine instructions for deputies the next day. In addition, I did other things such as representing the attorney general in 1972 and 1973 as a member of the New Jersey Workers' Compensation Study Commission. I continued as assistant attorney general until December 20, 1973 when I was sworn in as a Superior Court judge. However, after September 1973 when I was confirmed by the New Jersey Senate I no longer appeared in court.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I have partially answered this question by answering question 17a. When I was employed as a deputy attorney general before I went to Cape May I gave advice to the Department of Conservation and Economic Development and was active in trials and appeals for many state agencies. My clients in private practice in Cape May were, with rare exception, middle and lower income persons, small business persons and clients of that type, including a labor union.

While I did considerable criminal defense work I would never take a case involving what would now be called organized crime.

I cannot say I specialized in any particular field but I can say I did a great deal of general litigation particularly in chancery and criminal matters. I also handled wills, estates, real estate, zoning applications and practically anything else.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in court regularly from the time I passed the bar until I was confirmed as a Superior Court judge in September 1973.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) Other courts.

Until I became assistant attorney general I had almost no federal court experience. After that time I would estimate that 25% of my court time was federal and 75% was state. However certain of the federal cases were quite involved so in terms of actual work and responsibility the federal percentage would be higher. In New Jersey all state courts including municipal courts are courts of record.

3. What percentage of your litigation was:

(a) civil;
(b) criminal.

Excluding municipal courts, where traffic and petty *quasi*-criminal matters are tried, I estimate my civil-criminal percentage of litigation to be 60-40.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

It is extremely difficult for me at this late date to state the number of cases I tried to a conclusion from 1958 until 1973, but it was very many as I was in court so often. Further, I cannot research this as I have been a judge since 1973 and no longer have my old diaries. When I tried a case after 1960 I was always either sole or lead counsel, almost always the first.

5. What percentage of these trials was:

(a) jury;
(b) non-jury.

I tried a far higher percentage of completed non-jury than jury trials. The ratio may have been 15 to one.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I no longer have access to my files from either private practice or the office of the attorney general. Consequently, in answering this question I am using only reported cases. I was either sole or lead counsel in every case mentioned. In general in addition to trying the cases I worked them up to the trial stage.

(1) Board of Pharmacy v. Anderson, 40 N.J. 40, 190 A.2d 664 (1963). This case involved an appeal by a man operating a variety store from imposition of a small penalty for selling a bottle of citrate of magnesia. I represented the defendant at the trial and on appeal. I think the judge may have been Alvin Featherer, now deceased. Opposing counsel at trial was a deputy attorney general, but I do not remember which one. The case is of great importance, as evidenced by the amici curiae briefs on the appeal, because the issue was whether the product was a patent or proprietary medicine so it could be sold by a person who was not a registered pharmacist. It is my understanding that as a result of this case the sale of all kinds of medicines is allowed in supermarkets and other nonpharmacies.

(2) Cape May County Bar Assn. v. Ludlam, 45 N.J. 121, 211 A.2d 780 (1965). In this case I obtained a summary judgment on behalf of the Cape May County Bar Association, affirmed on appeal, against the defendant, a nonlawyer, enjoining him from conducting his conveyancing business. I note from the reported case the New Jersey Bar Association intervened but I recall that was only on the appeal. The case is significant as defining the scope of what constitutes the practice of law. The trial judge was John B. Wick, long since retired. It should be noted that the defendant was not the John Ludlam who was later associated with me. The defendant's attorney, George M. James, practices at 9900 Pacific Avenue, Wildwood, New Jersey 08260. His telephone number is (609) 522-3451.

(3) Sands v. Bd. of Examiners of Electrical Contractors, 90 N.J. Super. 82, 216 A.2d 254 (App. Div. 1966), aff'd 54 N.J. 484, 256 A.2d 42 (1969). I list this case even though the matter arose from an administrative proceeding. The case was significant because it limited the scope of the

jurisdiction of the Board of Examiners of Electrical Contractors. I handled the case in the administrative hearing before the board and on the appeal. The attorney for the State on the appeal, Richard Newman, is now a Superior Court judge in Newark. His telephone number is (201) 621-4793. I represented Jack Sands in this case, the man the board sought to regulate.

(4) Garrett v. State, 118 N.J. Super. 594, 289 A.2d 542 (Ch. Div. 1972). In this case I obtained a summary judgment from Judge George B. Francis, now retired, quieting title to certain lands claimed by the State as riparian or tide-flowed. The case was of great importance in protecting the State's interest in the lands. Robert F. Garrett, III, who was the defendant and represented himself, is still in practice at 801 Asbury Avenue, Ocean City, New Jersey 08226, telephone (609) 399-0035. There was no appeal in this case.

(5) David v. Cahill, 342 F. Supp. 463 (D.N.J. 1972). This was a trial I handled lasting several days before a three-judge District Court in Newark. The case was of vast public importance because it involved the redistricting of the New Jersey seats in the House of Representatives following the 1970 census, the Legislature having failed to act. I represented the Governor of New Jersey and the other State defendants. It is my recollection that I introduced into evidence the plan adopted. The judges were Circuit Judge Gibbons and District Judges Garth and Fisher. Raymond A. Brown, Gateway 1, Newark, New Jersey 07102, (201) 622-1846, represented the plaintiffs. David J. Goldberg, 112 Nassau Street, Princeton, New Jersey 08540, (609) 924-8900, represented the Democratic interests and Thomas R. Farley, 200 Executive Drive, West Orange, New Jersey 07052, (201) 325-7474, represented the Republican interests. I cannot remember if there were any appellate proceedings in this case but I find none reported.

(6) Brown v. Heymann, 62 N.J. 1, 297 A.2d 572 (1972). This case was a rare case in which the Supreme Court of New Jersey exercised original jurisdiction. The significance of the matter was that the court upheld the Executive Reorganization Act and the validity of a particular reorganization. I represented the State interests. Thomas L. Parsonnet, opposing counsel, is dead. In this case there was no trial or summary trial level proceedings so I argued only an appeal.

(7) Bayshore Sew. Co. v. Dept. of Environmental Protection, 122 N.J. Super. 184, 299 A.2d 751 (Ch. Div. 1973), aff'd 131 N.J. Super. 37, 328 A.2d 246 (App. Div. 1974). I tried this case for about a week before Judge McGowan, now retired, and obtained a judgment that the State properly revoked permits held by a sewer company. The case is frequently cited in the administrative law field. I think the trial was in the summer of 1972. The attorney for the plaintiff was William R. Holzapfel, Gateway 1, Newark, New Jersey 07102, (201) 643-8000.

(8) Bulman v. McCrane, 123 N.J. Super. 213, 302 A.2d 163 (Ch. Div. 1973), rev'd 64 N.J. 105, 312 A.2d 857 (1973). This case was of great public importance. The issue was whether the State violated the debt clause of the New Jersey

Constitution by entering into a long-term lease to have a building erected on its property which at the end of the lease would revert to the State. I lost the matter on summary judgment but appealed. On appeal, I wrote the brief but could not argue the matter as I had already been confirmed as a Superior Court judge when the appeal was heard. The Supreme Court certified the case directly, thereby bypassing the Appellate Division, and reversed, thus upholding the State plan. Judge Seidman, the trial judge, is retired but still is active as he holds settlement conferences for the Appellate Division. Opposing counsel was Kenneth L. Estabrook, 184 Elm Street, Westfield, New Jersey 07091, (201) 233-6800.

(9) Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd 417 U.S. 961, 94 S. Ct. 3163, 41 L.Ed.2d 1134 (1974). This case was significant as the court declared unconstitutional a New Jersey plan to aid private schools. I lost the case in the trial court and this was affirmed on the appeal. District Judges Barlow and Kitchen, who heard the case, are dead and the third judge, Circuit Judge Hunter, on senior status. Opposing counsel Ellen Kulka, is now at 4 Becker Farm Road, Roseland, New Jersey 07068, (201) 535-5319.

(10) Bonafield v. Cahill, 125 N.J. Super. 78, 308 A.2d 386 (Ch. Div. 1973), aff'd 127 N.J. Super. 149, 316 A.2d 705 (App. Div. 1974). This was a very significant case which upheld the power of the Governor to remove a workers' compensation judge. I defended the State officials here in the trial court. The point was that the compensation judges were not part of the judiciary. The Superior Court judge who heard the case, Judge Kimmelman, later resigned as a judge and was attorney general of New Jersey in Governor Kean's first administration. He is back in law practice now. Opposing counsel was Daniel E. Isles, 200 Executive Drive, West Orange, New Jersey, (201) 325-7474.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

This question makes no distinction between my service as a judge and my service as a lawyer. Consequently, I will answer the question both ways.

In my view my most significant activity as a judge relates to the fact that I have been able to write opinions expeditiously for publication when the public interest so requires. In this regard I bring the attention of the Committee to three cases: Enourato v. N.J Building Authority, supra, Gormley v. Lan, 181 N.J. Super. 7, 436 A.2d 535 (App. Div. 1981), aff'd 88 N.J. 26, 438 A.2d 518 (1981) and Kimmelman v. Burgio, 204 N.J. Super. 44, 497 A.2d 890 (App. Div. 1985). In Enourato there was a challenge to the legality of a $135,000,000 bond issue to be sold by the state authority. It was critically important to determine if the bonds were legal so the sale could go forward. It will be noted that my panel heard argument on the case on December 14, 1981 and I filed the opinion December 17, 1981. It was my understanding at the time of the case that New York bond counsel gave an unqualified opinion as to the legality of these bonds on the basis of my opinion even though the plaintiff could seek further review in the Supreme Court, which he did.

Gormley v. Lan and Kimmelman v. Burgio each involved challenges to interpretative statements for state constitutional questions to be voted on at general elections. The cases had to be resolved expeditiously because of printing and advertising requirements. It will be noted that Gormley v. Lan was decided on the same day it was argued and Kimmelman v. Burgio was decided two days after the argument.

Though I have emphasized the significance of speed in deciding these cases, I recognize that sometimes the problem of the necessity for a rapid decision is dealt with by a court publicly announcing its result and then later rendering a written decision. But in my view this procedure is undesirable for the following reason. Experience teaches that occasionally after a conference at which agreement is reached on an outcome, when the opinion is prepared the prior tentative outcome is changed. It has always seemed to me that if the court has already announced its result and people have relied on it that there would be a not so subtle pressure on a court to adhere to what it announced regardless of its later views. If the opinion can be immediately released this problem is avoided.

I also think that my activity in writing many reported opinions has been significant. These opinions are precedential and, unless overruled or reversed by the Supreme Court, are binding on all the trial courts in New Jersey. Because of these opinions, I have been able to make a significant contribution to the law in New Jersey. This is reflected in the fact that within the last year the New Jersey Law Journal, the weekly legal newspaper in New Jersey, in accordance with its recently adopted practice of featuring a digest of one case each week on its front page, has used three of my opinions, Anastasio v. Planning Board of West Orange, supra, State v. Chappee, supra, and Riley v. New Jersey Bell Telephone Co., 213 N.J. Super. 343, 517 A.2d 468 (App. Div. 1986), a per curiam opinion involving a procedural matter, for that purpose. Further, the Lawyers Co- Operative Publishing Co. has advised me that it will use In the Matter of N.J.A.C. 11:1-20, supra, as a reported or lead case for an American Law Report annotation.

There is no question in my mind that my most significant legal activity as an attorney relates to the resolution of the riparian land controversy in New Jersey. While I will attempt to describe this situation in as few words as possible, a fairly lengthy exposition is required for an understandable presentation.

In England, the sovereign in his or her official capacity owned the lands where the tide ebbed and flowed. Naturally, the State of New Jersey as successor to the sovereign took title to the tidelands at the time of the American Revolution. On the other hand, title to the lands within the State which were not subject to tidal ebb and flow became vested in the boards of proprietors and eventually became privately owned.

A study of the history of New Jersey will show that from the early days of the State there were occasional disputes regarding the ownership and use of the tidelands. Further, on a personal basis I can state that I was involved in some litigation concerning these matters many years ago. See River Development Corp. v. Liberty Corp., 29 N.J. 239, 148 A.2d 721 (1959). Nevertheless, until the late 1950's it cannot be said that the problem was overwhelming, a conclusion I assert because in general until that time it was thought that the State's claim to the tidelands was confined to well-defined stream beds and other obviously tide-flowed lands.

In the late 1950's, however, the Appellate Division of the Superior Court in an unreported decision ruled that the State owned certain meadowlands as they were tide-flowed. Meadowlands are not within well-defined tidal waterways. This ruling came in an inverse condemnation, an action in which a landowner claimed the State had taken his property for highway purposes and refused to pay him. The State successfully defended on a theory that it owned the lands as tidelands and thus was not obliged to pay for them.

The impact of this decision cannot be overstated as it literally caused chaos in the meadowlands areas of the State. As it happens, there are low-lying meadowlands throughout the State except in the northwest area. Further, some of these lands opposite New York City are of enormous value. The problem was that it is very difficult in a meadowland to determine where the high water line is located. See O'Neill v. State Highway Department, 50 N.J. 307, 235 A.2d 1 (1967). Thus, title to property thought to be privately owned was thrown into question. The difficulties were compounded by the fact that much meadowland had been filled so that it was necessary in title cases to ascertain what the condition of the land had been in its natural state as illegal filling would not deprive the State of its title. It is a great problem to do this on a case-by-case basis. An initial reaction to the problem was the establishment around 1961 of a Riparian Lands Study Commission to which I was appointed by Governor Robert Meyner. Subsequently, the Legislature sought to resolve partially the problem by L. 1968, c. 404, §88, N.J.S.A. 13:1B-13.2, which required the State to specify its riparian claims, if any, to meadowland. In response to this legislation the so-called gray and white map of the Hackensack Meadowlands was promulgated by the State. This map, however, only aggravated the problem because it unreasonably claimed all the meadowlands for the State. Consequently, in an action in the Superior Court, it was suppressed around 1971.

As a result of the foregoing history the situation in the meadowlands in 1971 was very difficult. Many landowners could not develop their land as title to it was not marketable. As might be expected, there were a great many lawsuits involving title claims of the State pending. Indeed I recall that the situation was so bad that at one point the Legislature authorized appointment of extra judges to hear the cases though I am not certain whether there were any actual appointments made. It is my recollection that when I was employed as assistant attorney general in charge of civil litigation there may have been 100 cases involving the State pending, some more than ten years old, dealing with riparian land title problems. When I was appointed, part of my assignment was to resolve these cases. While I did participate in much reported and unreported litigation involving riparian matters (see, e.g., State v. The Council, Div. of Resource Dev., 60 N.J. 199, 287 A.2d 713 (1972); Town of Secaucus v. Damsil, Inc., 120 N.J. Super. 470, 295 A.2d 8 (App. Div.

1972), certif. den. 62 N.J. 90, 299 A.2d 88 (1972); Garrett v. State, supra), more significantly I worked out settlements of dozens of cases, thereby obtaining reasonable compensation for the State's claim but freeing up property for development. Indeed, one case I settled was the leading case of O'Neill v. State Highway Department, supra, which had been remanded by the Supreme Court for trial. There can be no question that much hardship of private landowners was thereby eliminated and a significant contribution made to the development of the Hackensack meadowlands, a region of great prosperity which must provide tens of thousands of jobs. The settlement of these cases was a very delicate matter as the proceeds from the sales are dedicated to the support of the public schools. Further, the matter was very much in the public view as there were frequent newspaper articles about the problem and how it was handled. It should be noted that the settlement of the claims had no adverse environmental impact as the properties involved were practically all filled.

After I left the attorney general's office, the State developed proper mapping techniques which were approved by the Supreme Court of New Jersey in Newark v. Natural Resource Coun. Dept. Env. Prot., 82 N.J. 530, 414 A.2d 1304 (1980), cert. den. 449 U.S. 983, 101 S. Ct. 400, 66 L.Ed.2d 245 (1980). It is my understanding that while there are still some cases involving riparian land controversies, the problem is now manageable in scope.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

Under New Jersey State law I may take early retirement based on 25 years of public service and obtain a reduced pension. I intend, if confirmed and appointed, to do that. Other than the pension I have no interests of the type set forth in the question.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

There will be no conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

In the fall of 1965 I headed a committee of attorneys supporting the Republican candidates for the New Jersey Legislature in Cape May County. While it is difficult at this late date to remember the details of the campaign, I do recall speaking for the ticket at several meetings. I also can remember some actual door-to-door campaigning. The candidates were Frank S. Farley, John Hunt and William Haines.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Not applicable. These matters were resolved 15 years ago.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

ASSETS OF MORTON I. GREENBERG

Cash on hand and in United Jersey Bank	$ 33,000
1188 Shares of Common Stock in Atlantic Electric Co. (market value)	45,441
180 Shares P-W Industries (book value)	55,260
Condominium Apartment at 1309 Bradley Court, Princeton, N.J. (S. Brunswick Twp.) (Assessed value of property is $63,500. I have calculated value at $90,000 on basis of advice from a real estate salesperson.)	90,000
Value of retirement interest in New Jersey Judicial Retirement Pension System	220,000
Individual Retirement Account at United Jersey Bank (This amount is as of last statement of December 31, 1986.)	12,057.56
Cash value, Dividends Accrued and Interest on Pacific Mutual Ins. Co. Policy 0014891070	10,275.45
Cash value of Pacific Mutual Ins. Co. Policy 0017844350	702.73
Cash value, Dividends accrued and Interest on New York Life Policy 25 682 276	12,488.64
Cash value and Dividends Accrued on Bankers National Life Insurance Company Policy 310754.	11,212.56
1985 Chevrolet Cavalier	5,000
Interest in Estate of Pauline Greenberg, deceased (This figure was supplied by the attorneys for the estate and is their estimate of what I will receive after payment of United States estate taxes, New Jersey Transfer Inheritance Taxes and Administration Costs.)	400,000
Furniture and personal property (estimate)	1,000

Bonds of Independent School District No. 281 (Robbinsdale, Minnesota)	10,000
Total Assets	$906,437.94

LIABILITIES OF MORTON I. GREENBERG

Mortgage on S. Brunswick Condominium to Bell Savings Bank	44,231.99
Net Worth	$862,205.95

Notes to Financial Statement:

My son Lawrence R. Greenberg resides with me. He owns two automobiles worth about $18,000, has about $20,000 in United Jersey Bank, has U.S. Savings bonds with a face value of $1,325, owns 134 shares of Atlantic Electric worth $5,125.50 and 190 shares of Midlantic Bank worth $6,935. I have not included his assets with mine. He has a $9,000 car loan on one car. I own stock in Linwood County Club but I am not a member of the club and as the stock pays no dividends I regard it only of nominal value and have not listed it as an asset. P-W Industries is a small corporation with offices at Suite 4, 801 West Street Road, Feasterville, Pennsylvania 19047, with plants in Georgia and California. It is in the cable tray business. I have listed it at book value as there is no active market in the stock. I have no contingent liabilities as endorser, co-maker, guarantor, or on a lease or contract of any sort, directly or indirectly. There are no legal claims of any sort pending against me or which I contemplate. I expect to receive a refund on my 1986 income taxes. I have no liabilities other than I have shown except for the ordinary use of credit cards and utilities which have not been billed. None of my assets is pledged or otherwise encumbered except for the mortgage above listed. I am not a defendant in any suit or legal action and never have been. I have never been in bankruptcy. I have not included in my assets items such as prepaid insurance, a prepaid club membership, prepaid appliance service contracts and accrued but unpaid salary from the State of New Jersey, as they are not material in terms of my total net worth. The value of my interest in the New Jersey Judicial Retirement Pension System was supplied by a stockbroker who is expert in making such valuations. I point out, however, that my contributions are only a few thousand dollars as the system was not contributory until about four years ago.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

   (a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

In general I do not believe that it is wise for a federal judge to engage in judicial activism. I have so concluded as judges, unlike Senators and Representatives, are not elected and thus have no direct mandate from the people to carry out a particular program. While I recognize that it is sometimes said that if judges are not activists things may not be done, in my view if things are not changed it is because Congress does not want them changed. Judges in imposing duties may simply require implementation of programs that *they* think are right. I also think that judges generally should avoid taking on responsibilities which detract from their time to carry out their legitimate function of deciding particular cases.

I think that the litigation which best illustrates my approach to judicial activism is *N.J. Ass'n for Retarded Citizens v. Human Services*, 89 *N.J.* 234, 445 *A.*2d 704 (1982). In that case I was the *trial* judge in *a* very long non-jury trial. In general the plaintiffs asserted that the constitutional and statutory rights of mentally retarded persons at the Hunterdon State School were being violated by the State defendants. As I recall it, the plaintiffs wanted me to appoint a receiver or other officer to institute changes in the school. After the trial I concluded that the defendants were doing an excellent job and had violated no duties to the plaintiffs justifying the granting of relief. I was further convinced that it would have been foolish and counterproductive to appoint an officer responsible to the court to run the school. I set forth my findings in a long oral opinion which was affirmed by the Appellate Division.

The Supreme Court of New Jersey granted certification and in an unusual decision did not review the Appellate Division decision. Instead it exercised original jurisdiction and gave a declaratory judgment defining the rights and duties of the parties. Of course it did not suggest that my decision had been wrong.

This case represents well the different approaches to litigation. I considered that the case involved grievance-resolution and that the plaintiffs had simply failed to show they were entitled to relief. Thus, no far reaching order or broad affirmative duty was imposed on them. In fact, I entered no order at all against them. The Appellate Division obviously agreed with my approach. The Supreme Court took a different course.

It should, however, be pointed out that regardless of the views of an intermediate appellate judge regarding judicial activism, a faithful following of the precedents may require the judge to render an activist decision. I was precisely in that position in *Matthews v. Bay Head Imp. Ass'n*, 95 *N.J.* 306, 471 *A*.2d 355 (1984). *Matthews* was celebrated litigation in New Jersey. *In general* it involved an attempt, sustained by the trial court, of property owners in Bay Head, a municipality on the ocean, to keep nonresidents off the beaches of the municipality. While it was clear to everyone that the municipality itself could not have done that, the defendants had established a private association to run the beaches and thus had circumvented established law. When the case reached the Appellate Division my panel affirmed, but I dissented in only one of two dissents I have ever filed. While I recognized that the trial judge had written a thoughtful opinion, it was clear to me that the precedents in New Jersey would not permit the system set up. I was correct in this view as the Supreme Court of New Jersey reversed the Appellate Division. I cannot deny that it may be reasonably argued that my result would have placed broad duties on the defendants to establish a new system and thus would have involved the courts in the matter on an ongoing basis. In fact, according to press accounts following the Supreme Court decision, there have been disputes about use of the Bay Head beaches. Nevertheless, I could not refuse to reach a result compelled, in my view, by the higher court.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide *pro bono* legal representation to the disadvantaged.

I can best answer the first part of this question by pointing to my opinions, many of which are reported and are thus easily available. I am not embarrassed to say that I have discharged the duties of my office fairly and impartially. I think that my record which has been established over many years, and certainly could not be fabricated to answer these questions, shows an appropriate balance between the conflicting interests inevitable in litigation.

In addition I want to point out certain opinions I have written which I think reflect a concern with litigants' obtaining justice on the merits. In *Wilkins v. Smith*, 181 *N.J. Super*. 121, 436 *A*.2d 951 (App. Div. 1981), I wrote an opinion dealing with the Unsatisfied Claim and Judgment Fund law which provides protection for persons injured by uninsured motorists. The opinion construed the time constraints for giving notice under the statute to treat an infant's claim as timely in a situation where adults would have been barred. In *Barbaria v. Sayreville Tp*., 191 *N.J. Super*. 395, 467 *A*.2d 259 (App. Div. 1983), app. dis'm 97 *N.J.* 645, 483 *A*.2d 170 (1984), I wrote an opinion of similar nature under the New Jersey Tort Claims Act. In these cases I considered that the applicable statutes could reasonably be construed in favor of infants and I wanted their claims considered on the merits so that they would receive substantive justice. *See also In re Karamus*, 190 *N.J. Super*. 53, 461 *A*.2d 1193 (App. Div. 1983), for a similar ruling.

In *Handelson v. Bd. Trustees, PERS*, 193 *N.J. Super*. 223, 473 *A*.2d 104 (App. Div. 1984), I wrote that a statute providing a public employee could apply to purchase back pension credits for a period of temporary service, provided she agreed to do so within one year of receiving permanent employment, could be construed to allow the purchase if the employee initiates the procedure to make the contribution within the one-year period. Thus, we required the State agency to consider the employee's application on the merits. In In re Crowley, 193 N.J. Super. 197, 473 A.2d 90 (App. Div. 1984), I wrote that a pro se litigant who had for procedural reasons improperly appealed was nevertheless entitled to have his appeal considered on the merits as it would have been hypertechnical for the court not to reach the merits as the respondent had not been prejudiced by the procedure. In that case, we remanded the matter to the agency to consider whether the appellant had been discriminated against in seeking a promotion because of his union activities. He had been denied a hearing on this point even though he had made a showing of discrimination. In these public employee cases, it was reasonable to provide for hearings on the merits so the employees could be given equal justice under the law.

My concern for equal justice so that procedure is not used to bar a litigant from obtaining rulings on the merits has not been confined to civil cases. Thus, in State v. Lopez, 188 N.J. Super. 170, 457 A.2d 20 (App. Div. 1983), I wrote an opinion reversing an order of a trial judge who in a pretrial ruling struck the defendant's psychiatric defense of insanity. We held that the judge had no right to preempt the jury's power to pass upon an insanity defense.

I do not, however, by reason of my citation of the foregoing decisions want to create an impression that all procedural rules and time constraints can be relaxed to reach the merits of a controversy. Sometimes the clear language of the applicable rules or statutes preclude that. Certainly the court must carry out the legislative mandate when clearly stated. Thus in Tyson v. Groze, 172 N.J. Super. 314, 411 A.2d 1170 (App. Div. 1980), I wrote that an infant's tort claim following the reduction of the age of majority from 21 to 18 years had to be brought within two years of the infant's becoming 18 and, as the plaintiff had not done that, his action was properly dismissed by the trial court. It should be noted that the headnote to the opinion by West Publishing Company completely misstates the holding. A similar strict result was reached in Cabrera v. Tronolone, 205 N.J. Super. 268, 500 A.2d 755 (App. Div. 1985), dealing with the time to serve a motion for a new trial.

With respect to pro bono legal representation to the disadvantaged I can state the following. When I started practicing law privately in 1960, New Jersey did not have a public defender system for criminal cases, though one was established later. Instead, except in murder cases, the bar on an assigned basis represented indigent defendants without fee. I regularly handled these no fee cases. Further, when I lost a case I did not hesitate to appeal for my client, also without fee. While it is impossible at this time for me to list all the criminal defendants I represented without fee I can cite one case, State v. Cruz, 76 N.J. Super. 325, 184 A.2d 528 (App. Div. 1962), as it is reported. In that case I lost at trial and on appeal advanced a technical constitutional argument for the defendant. It will be obvious from a reading of the case that the defendant himself did not conceive of the illegal incorporation by reference issue I raised. But I wanted this indigent defendant to get the same defense that a prosperous person would have gotten so I appealed for him. Please note that my assignment did not require me to appeal. Rather, I did it on my own.

I also frequently did civil legal work for disadvantaged persons without fee or for a nominal fee. In fact, I became a member of the bar of the Tax Court in exactly such a case. A disadvantaged woman who worked as a household day-worker came to me because the Internal Revenue Service disallowed her claim for a deduction for her child. I thought the IRS acted arbitrarily and thus I joined the Tax Court bar and brought the suit at my own expense. I remember that fortunately I did not have to try the case because after the attorneys for the IRS got the case the agency changed its position and her claim was allowed.

I do not know how much the deduction was worth to my client but I did not care. I thought she was getting unfair treatment and I was determined to remedy it and I did so.

While I have given these examples I could cite other cases as well. I remember obtaining divorces for indigent people for little or no fee. It must be remembered, of course, that during about one-half of the time I was in private law practice there was no legal services office. While the bar association did fund a local legal aid program in Cape May County where I practiced, it was practically of no use. Thus, in the real world, if private attorneys did not represent the disadvantaged, no one did.

Rev'd 2/20/87 RCG

AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
50 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

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February 18, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: MORTON I. GREENBERG
United States Court of Appeals
for the Third Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Morton I. Greenberg for appointment as Judge of the United States Court of Appeals for the Third Circuit.

A majority of our Committee is of the opinion that Judge Greenberg is "Exceptionally Well Qualified" for this appointment. The minority found him to be "Well Qualified".

Sincerely,

Robert B Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAHPY

JAMES B. ZAGEL

Birth:	March 4, 1941	Chicago, Illinois
Legal Residence:	Illinois	
Marital Status:	Married	Margaret Maxwell Zagel
Education:	1958 - 1962	University of Chicago B.A. degree M.A. degree
	1962 - 1965	Harvard Law School LL.B. degree
Bar:	1965	Illinois
Experience:	1965 - 1969	Cook County State's Attorney's Ofc Assistant State's Attorney
	1969 - 1977	Illinois Attorney's General Office Assistant Attorney General Deputy Chief, Criminal Justice Division (1969-1970) Chief, Criminal Justice Division (1970 - 1977) Chief Prosecuting Attorney, Illinois Judiciary Inquiry Board (1973-1975)
	1975	Arizona Attorney General's Office Chief Assistant Attorney General
	1977 - 1979	Illinois Law Enforcement Commission Executive Director
	1978 - present	Governor's Advisory Council on Criminal Justice Legislation Chairman and Member
	1979 - 1980	Illinois Department of Revenue Director of Revenue
	1980 - present	Illinois Department of State Police Director of State Police
Office:	100 West Randolph Room 4-600 Chicago, Illinois 60601 312 917-2834	
	103 Armory Building Springfield, Illinois 62706 217 782-7263	
Home:		

To Be United States District Judge for the Northern District of Illinois

QUESTIONNAIRE FOR JUDICIAL NOMINEES

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

I. Biographical Information

I. Full Name.

James B. Zagel

2. Address: List current place of residence and office addresses.

Residence: Chicago, Illinois

Offices:
Room 4-600
100 West Randolph
Chicago, Illinois 60601

103 Armory Building
Springfield, Illinois 62706

3. Date and place of birth.

March 4, 1941 at Chicago, Illinois

4. Marital Status: (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address.

I am married to Margaret Maxwell Zagel who is an attorney employed as Firm Counsel at Grant, Thornton, 1700 Prudential Plaza, Chicago, Illinois 60601.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received and dates degrees were granted.

University of Chicago, September, 1958 - August 1962, B.A. (June 1962), M.A. (Philosophy) (August 1962)

Harvard Law School, September 1962 - June 1965, LL.B.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other organizations, nonprofit or otherwise, including farms, with which you were connected as an officer director, partner, proprietor, or employee since graduation from college.

a. August 1980 - Present
Director of State Police
State of Illinois

b. February 1979 - August 1980
Director of Revenue
State of Illinois

c. February 1977 - February 1979
Executive Director
Illinois Law Enforcement Commission
State of Illinois (employer)

d. February 1969 - February 1977
Assistant Attorney General
Chief, Criminal Justice Division
Office of the Attorney General (employer)
State of Illinois

e. January 1975 - June 1975
Chief Assistant Attorney General
Office of the Attorney General
State of Arizona

f. November 1965 - February 1969
Assistant State's Attorney
Office of the State's Attorney
Cook County, Illinois

g. June 1962 - August 1962
Camp Counselor
Camp Horseshoe
Minong, Wisconsin

h. From April 1977 to December 1984 I served, without compensation, as a member of the board of directors of Speed-o-Print Corporation whose publicly traded stock was largely owned by members of my family. My participation was limited to routine written approval of resolutions and ended when the corporation's shares were sold to an outside group.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

National Service Award of the National District Attorneys Association (1972)

Distinguished Faculty, National College of District Attorneys

Honorary Faculty, Judge Advocate General School

Outstanding Young Citizen, Chicago Jaycees (1977)

Outstanding Public Service, Illinois Attorney General (1976)

Award of Merit for Distinguished Service to Law Enforcement in the State of Illinois, Association of Commerce and Industry (1983)

Senior Honors Paper, Harvard Law School (1965)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Professional Activities

Illinois Supreme Court Committees

Member, Committee on Criminal Discovery Rules of the Supreme Court of Illinois

Member, Committee on Courtroom Videotape of the Supreme Court of Illinois

American Bar Association Committees

Member, Task Force on Criminal Appeals, Appellate Review of Sentences and Post-Conviction Remedies

Memberships

Chicago Bar Association
Illinois Bar Association
American Bar Association

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.)

I am a member of the Illinois and International Association of Chiefs of Police which, to some extent, lobby before public bodies.

In my capacity as Director of State Police I have appeared before legislative committees and submitted written materials arguing for or against legislative proposals that affect the administration of police agencies and the criminal justice system as a whole. I performed similar acts as Director of Revenue on questions of tax law.

I am a member of social and religious organizations as well:

(1) Temple Sholom
(2) University Club of Chicago

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Illinois (1965)
Supreme Court of the United States (1969)
United States Court of Appeals for the Seventh Circuit (1972)
United States District Court for the Northern District of Illinois (1965)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Books

Criminal Law and Its Administration, (2nd Edition, 1974); (3rd Edition, 1980); (4th Edition, 1984) (with Fred Inbau and James Thompson) (Foundation Press)

Cases and Comments on Criminal Procedure (1974) (2nd Edition, 1980) (with Fred Inbau, James Thompson, James Haddad and Gary Starkman) (1987 Edition in printing) (Foundation Press)

Monographs

Miranda v. Arizona - A Commentary and Outline of the Law, National District Attorneys Association (1970) (Revised Ed. 1978)

The Criminal Law Decade of the United States Supreme Court, National District Attorneys Association (1971)

Articles

"The State Secrets Privilege", 50 Minn. L. Rev. 876 (1966)

"Criminal Discovery in the States and the Genesis of the New Illinois Rules", 1972 Ill. L.F. 557 (with Jayne A. Carr)

Foreword, "The Lion Roared Once", 64 J. Crim. L. & C. 379 (1973)

"The Constitution and Eyewitness Identification" in The Prosecutor's Deskbook, National District Attorneys Association (1972)

"Psychiatry and the Law", in The Prosecutor's Deskbook (1972)

"Tax Enforcement: New Revenue for the 1980's" in Revenue Administration (1980), National Association of Tax Administrators (with David A. Ward)

Book Review

"Taking the Fifth", 72 J. Crim. L. 1001 (1981)

Chapters in Manuals

"Pre-Trial Discovery in Illinois Courts" in Illinois Criminal Practice (1978) IICLE with Deborah J. Gubin

"The Insanity Defense" in The Prosecution of a Criminal Case (1979) IICLE (1986) with Robert Ogren

"Demonstrative and Real Evidence", "Eyewitness Identification and the Constitution", "Pleas of Guilty", "Psychiatric Issues and the Criminal Law", "Arrest, Search and Seizure" with James B. Haddad, and "Confessions in the Courtroom" with Thomas Burnham--all in Materials for the Short Course for Prosecuting Attorneys, 1974-1986. Northwestern University School of Law.

Speeches

I have lectured and spoken on several occasions. I do not speak from a prepared text. The subjects are generally those covered by the written materials cited above. I am unaware of any press reports of my lectures, a general list of which follows:

Lecturer, Northwestern University School of Law, Short Court for Prosecuting Attorneys (1968-1986) - Guilty Pleas, Confessions, Search and Seizure, Eyewitness Identification, Insanity Defenses, and Demonstrative Evidence

Lecturer, Scientific Evidence in Criminal Cases, Northwestern University School of Law (1980-86)

Lecturer, National College of District Attorneys, University of Houston (1970-79, 1981-82) - Suppression Hearing Procedure

Speaker, Annual Conference of Multistate Tax Commission, Denver, Colorado (1980) - Foreign Source Dividend Taxation and Combined Unitary Apportionment-Congressional Proposals

Speaker, Annual Meeting, National Association of Tax Administrators, Philadelphia (1980) - Tax Enforcement

Lecturer, Military Judges Course, Judge Advocate General School, University of Virginia (1976-78) - Judge and Prosecutor

Speaker, Conference for Appellate Court Judges of Colorado, Oregon and Washington, (1970)- Analyzing Criminal Cases on Appeal

Lecturer, Appellate Advocacy Course, Americans for Effective Law Enforcement, Houston Texas (1979)

Lecturer, Illinois Institute for Continuing Legal Education - various courses

Lecturer, National District Attorneys Association Seminars for Prosecutors in Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Minnesota, Missouri, New York, Rhode Island, Tennessee, Texas, Washington D.C., Wisconsin (1969-86)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent; January 1986

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Not Applicable

15. Citations: If you are or have been a judge, provide citations for (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not Applicable

16. **Public Office:** State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1980 - Present Director of State Police
State of Illinois
(Appointment by Governor, Confirmation by State Senate)
(Reappointment and Reconfirmation required every two years)

1978 - Present Chairman, Governor's Advisory Council on Criminal Justice Legislation
(Appointment by Governor)

1979 - 1980 Director of Revenue
State of Illinois
(Appointment by Governor, Confirmation by State Senate)

1977 - 1979 Executive Director, Illinois Law Enforcement Commission
(Appointment by Governor, Confirmation by State Senate)

1969 - 1977 Assistant Attorney General, State of Illinois
(Appointment by Attorney General)

1975 Chief Assistant Attorney General, State of Arizona
(Appointment by Attorney General)

1965 - 1969 Assistant State's Attorney, Cook County Illinois
(Appointment by State's Attorney)

I have not been a candidate for elective office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

(1) 1965 - 1969 Cook County State's Attorney's Office
2600 South California Avenue
Chicago, Illinois 60608
Assistant State's Attorney

I briefed and argued numerous criminal appeals to the Appellate and Supreme Courts of Illinois and was assigned to an extended prosecution unit which was responsible for the prosecution of significant cases including People v. Speck.

(2) 1969 - 1977 Illinois Attorney General
188 West Randolph Street, Chicago, Illinois 60601
Assistant Attorney General
Deputy Chief, Criminal Justice Division (1969-1970)
Chief, Criminal Justice Division (1970-1977)
Chief Prosecuting Attorney, Illinois Judiciary Inquiry Board (1973-1975)

There I personally prosecuted and supervised prosecution in cases involving state tax evasion, official misconduct, financial crimes, multi-county crimes and violent crimes. I conducted and supervised investigations and exercised discretion in deciding whether to file charges and whether to accept proposed pleas of guilty as in the Equity Funding fraud cases.

This work had not been done by the Attorney General's office prior to my tenure. I defended and supervised defenses in civil proceedings in federal courts challenging state convictions and the conduct of state officers and employees. I reviewed all briefs filed on behalf of the People in appeals to the Supreme Court of Illinois. I argued and supervised appeals in the United States Supreme Court and the Court of Appeals and in the Appellate and Supreme Courts of Illinois.

As Chief Prosecuting Attorney for the Judicial Inquiry Board, I prosecuted complaints against state judges filed by the Board and tried before the Illinois Courts Commission.

(3) 1975 Arizona Attorney General's Office
State Capitol
Phoenix, Arizona 85007
Chief Assistant Attorney General

While on leave from Illinois, I served six months in Arizona to assist the newly elected (then) Attorney General Bruce Babbitt, in assessing the quality of his lawyers and developing legislation, policy and procedure.

(4) 1977 - 1979 Illinois Law Enforcement Commission
120 South Riverside Plaza
Chicago, Illinois 60604
Executive Director

I administered a state criminal justice planning agency with 120 employees which was responsible for the disbursement of Law Enforcement Assistance funds in an annual amount of 30 million dollars. The 755 funded programs were studied, monitored and audited by the agency.

(5) 1978-Present Governor's Advisory Council on Criminal Justice Legislation
100 West Randolph, Room 4-600
Chicago, Illinois 60601
Chairman and Member

I preside over a council of judges, lawyers and other experts in criminal justice matters which, primarily, reviews all criminal justice legislation passed by the General Assembly and recommends to the Governor whether he should sign, veto or amend by veto the passed bills.

(6) 1979 - 1980 Illinois Department of Revenue
101 West Jefferson Street
Springfield, Illinois 62708
Director of Revenue

There I administered a department of 3,000 employees with an operations budget of 60 million dollars, an annual collection figure of eight billion dollars and a disbursement budget of one billion dollars. Apart from administrative duties, I supervised rule making and hearing functions of a staff of 45 lawyers and personally ruled on substantial questions concerning the application of state law. I reviewed all proposed tax legislation and decided whether to support, oppose or seek modification, as well as developing and supporting proposals on behalf of the Department. I testified before the General Assembly and the United States Congress on issues of tax law. I dealt occasionally with state finance, contract and employment law issues.

(7) 1980 - Present

Illinois Department of State Police
103 Armory Building
Springfield, Illinois 62706
Director of State Police

As the State's chief law enforcement officer, I am charged with the operation of a department of 3,300 sworn and civilian personnel and an operating budget of 150 million dollars. The agency's main functions consist of (a) specialized investigation and evaluation of cases of financial crime, breaches of integrity by state employees, narcotic offenses and violent crimes; (b) general uniformed officer patrol, including specialties such as monitoring hazardous material transport and riot control; (c) fully accredited laboratory and criminalistics service; and (d) a large, on-line computer operation providing data required by courts and police throughout the state.

In addition to general oversight, the recurrent legal aspect of my work includes the review and determination of the lawfulness of investigative methods in general and in particular cases, and the determination of whether facts disclosed by investigation constitute a violation of criminal or civil laws. Moreover, I analyze all proposed criminal justice bills and decide whether the Department should support, oppose or seek to modify these legislative proposals. I maintain currency in the areas in which I have practiced, and currently teach, criminal law, procedure and evidence. Finally, on a non-recurring basis, I deal with legal questions arising from procurement contracts, state finance law and employment and collective bargaining practices.

b. 1. What has been the general character of your practice, dividing it into period with dates, if its character has changed over the years?

2. Describe your typical clients, and mention the areas, if any, in which you have specialized.

My practice has been that of prosecuting attorney and my principal concerns have been the law which governs crimes, criminal procedure, evidence and appeals. I developed particular specialization in psychiatric defenses to criminal charges. Service in the Attorney General's office required that I maintain proficiency in these areas and also required familiarity with civil procedure, primarily in federal courts because of the substantial civil caseload generated by state prisoners filing both individual and class-action complaints and a number of cases challenging the constitutionality of state statutes. In that capacity I represented as clients officers and employees of the state. I have appeared before the Circuit, Appellate and Supreme Court of Illinois, before the District Court, Court of Appeals and Supreme Court of the United States, before numerous grand juries and the Illinois Courts Commission.

I have maintained a steady workload of lectures and writings and in the course of this work have acquired some learning about the rules and procedures of several jurisdictions other than my own. The study of comparative evidence and procedure has occupied a significant part of my time.

At the Attorney General's office, I developed, for the first time, a general program for the prosecution of financial crime, beginning with the first systematic program of enforcing criminal violations of state tax law. This led to a knowledge of and interest in tax law, which deepened when I became Director of Revenue.

c. 1. Did you appear in court regularly, occasionally, or not at all? If the frequency of your appearances has varied during this period, please describe each such variance giving the dates thereof.

2. What percentage of these appearances was in:

   a) federal courts
   b) state court of record
   c) other courts

3. What percentage of your litigation was:

   a) civil
   b) criminal

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percent of these trials was:

   a) jury
   b) non-jury

After my appointment as Director of Revenue I did not appear in court.

Prior to my service as a state officer, I appeared in court regularly:

. 80 percent of these appearances were in state court;
. 20 percent of these appearances were in federal court.

I tried twenty-five cases to verdict. In all but two of these I was chief or sole counsel. Thirteen of these cases were jury trials. I orally argued over one hundred cases on appeal in federal and state courts.

18. Litigation: Describe ten of the most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case,

(a) the date of representation;

(b) the name of the court and the name of the judge before whom the case was litigated; and

(c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) Lego v. Twomey, 404 U.S. 477 (1972)

Before: The Supreme Court of the United States

Judges: Burger, C. J. Douglas, Brennan, Stewart, White, Marshall and Blackmun, J.J.

Dates: Argued: October 11, 1971. Decided: January 12, 1972.

Opposing
Counsel: Nathan Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
202/293-6400

The primary issue was the constitutionality of an Illinois rule which allowed an accused's confession into evidence if the state proved, by a preponderance of the evidence, that the confession was voluntary. The accused argued that voluntariness should be proved beyond a reasonable doubt. I represented the state, wrote the brief after extensive research and presented oral argument to the Court. The Court approved the Illinois rule. The decision was particularly significant because it resolved open questions about the proof the prosecution must produce to secure admission of evidence against defense claims that the evidence was illegally obtained. Prior to this case, there was wide variation in opinions of lower courts.

2) People v. William Riley Gonder

Before: The Circuit Court of Illinois

Judge: Honorable William Eovaldi

Date: Indictment: June, 1972. Trial: December, 1972.

Opposing
Counsel: Robert Douglas
103 Old Indian Boundary Road
Robinson, Illinois 62454
618/544-8637

Co-Counsel: E. James Gildea
111 West Washington Street, Suite 925
Chicago, Illinois 60602
312/372-3127

In the summer of 1972, William Riley Gonder kidnapped, raped and murdered an eight year old girl. There were neither eyewitnesses nor admissions to the crime, and the case against Gonder was built upon circumstantial and scientific evidence--most significantly ash remnants of book pages which were matched precisely to three children's books that the victim had in her possession before the crime. After lengthy pre-trial hearings, a jury convicted the accused of all offenses charged ending a ten-day trial. I was chief prosecuting attorney.

(3) People v. Hyche and Taylor

Before: The Circuit Court of Illinois, Effingham County

Judge: Honorable George Kasserman

Date: Indictment: March, 1976. Trial: Taylor, August, 1976.
Hyche, August, 1976.

Opposing
Counsel: John Prusik (Hyche)
Crooks and Gilligan
One North La Salle Street

Chicago, Illinois 60602
312/726-7650

Scott Belford (Taylor)
255 North Ottawa Street
Joliet, Illinois 60431
815/723-8343

Co-Counsel: Roger Longtin
8300 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312/876-3384

Two individuals, stopped for speeding by an Illinois State Trooper, attacked the officer and after a struggle shot him to death. They fled from the scene and, in the course of their flight, kidnapped a teen-aged girl. They were apprehended after an extensive car chase ending when their vehicle crashed. The cases of the two defendants were severed and each was convicted in separate jury trials after extensive pre-trial proceedings. I was chief prosecuting attorney in both trials.

(4) In re Judge Oakey, 1 Ill. Courts Comm. Reports 66 (1975)

Before: The Illinois Courts Commission

Judges: Justices Schaefer, Stamos and Eberspacher, Judges Forbes and Dunne

Dates: Complaint filed: March 7, 1975. Hearing, June, 1975.

Opposing Counsel: David Schippers
79 West Monroe Street, Room 400
Chicago, Illinois 60603
312/263-1200

Co-Counsel: Steven J. Rosenberg
77 West Washington,Suite 1614
Chicago, Illinois 60602
312/726-0383

The respondent judge received income related to his business prior to his assuming judicial office. The principal issue before the Commission was whether a judge could, consistent with judicial office, engage in business and to what degree. After pre-hearing proceedings and a hearing, the Commission found Judge Oakey had violated rules of judicial conduct and removed him from the bench. I served as chief prosecuting attorney.

(5) People v. Gunnar K. Erickson

Before: The Circuit Court of Illinois, Cook County

Judge: Honorable Marvin Aspen

Dates: Indictment: December, 1973. Trial, June, 1974.

Opposing Counsel: Robert Colon
Address Unknown

Co-Counsel: John De Rose
20 North Clark Street, Suite 1902
Chicago, Illinois 60602
312/899-1171

The accused was a Special Assistant Attorney General of Illinois. He stated to several aliens illegally residing in Illinois that he could secure residence permits ("green cards") for them by virtue of the influence of his office. He accepted money to perform this service which he was, in fact, unable to perform and did not attempt to perform. He was indicted for theft. After indictment, he attempted to bribe a witness and was indicted again. This case tested the ability and willingness of an office to clean its own house. At a trial by jury, defendant was convicted. I was chief prosecuting attorney at trial.

(6) Kirby v. Illinois, 406 U.S. 682 (1972)

Before: The Supreme Court of the United States

Judges: Burger, C.J., Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell and Rehnquist, J.J.

Dates: Argued November 11, 1971. Reargued: March 20-21, 1972. Decided June 7, 1972

Opposing
Counsel: Jerrold Solovy
One IBM Plaza
44th Floor
Chicago, Illinois 60611
312/222-9350

The issue was the time at which arises right to counsel at an eyewitness identification procedure. Moreover, the Court also was asked to reconsider the rule providing for counsel at such procedures. I represented Illinois, wrote the brief after conducting research and presented oral argument and reargument to the Court. The Court decided that the right to counsel at identification procedures attaches at the initiation of judicial criminal proceedings and not at routine police investigations. Prior to the decision in this case, lower courts had been seriously divided over the question, the answer to which had a very significant effect on police procedures and the dispositions of many criminal cases.

(7) In re Kaye, 1 Ill. Courts Comm. Reports 36 (1974)

Before: The Illinois Courts Commission

Judges: Justices Schaefer, Stamos and Eberspacher
Judges Forbes and Dunne

Dates: Complaints filed: November 19, 1973, May 7, 1974

Hearing: June, 1974

Opposing
Counsel: Jack A. Brunnenmeyer
Peoria, Illinois
(deceased)

Co-Counsel: Jayne Carr Thompson
150 North Michigan, Suite 2120
Chicago, Illinois 60601
312/236-8745

This case was a trial of several charges against a sitting state court judge. I prosecuted the charges on behalf of the Judicial Inquiry Board. The issues of legal significance were two: whether a judge may properly receive funds for use by the county law library from attorneys representing litigants in pending cases, and whether the Commission could impose sanctions with respect to the conduct of a judge which occurred prior to his assumption of judicial office. The Commission held that pre-judicial conduct was outside its jurisdiction. It did find the receipt of funds improper and censured the judge.

(8) Witherspoon v. Illinois 391 U.S. 510 (1968)

Before: The Supreme Court of the United States

Judges: Warren, C. J., Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall

Dates: Argued: April 24, 1968. Decided: June 3, 1968.

Opposing
Counsel: Albert E. Jenner
One IBM Plaza, 44th Floor
Chicago, Illinois 60611
312/222-9350

Co-Counsel: Donald J. Veverka
180 North Michigan, Suite 900
Chicago, Illinois 60601
312/372-5665

The issue here was what degree of opposition to the death penalty would disqualify a juror from sitting on a capital jury, and whether the exclusion of such objectors deprived the accused of a fair trial on the issue of his guilt or of his sentence. I researched and wrote one of two briefs for the respondents in this case and offered oral argument before the Court. The decision in this case which prohibited disqualification unless it was clear a juror could not under any circumstances return a capital verdict significantly altered practices in capital cases throughout the country.

(9) Allum v. Twomey, 484 F.2d 740

Before: The United States Court of Appeals,
Seventh Circuit

Judges: Hastings, Cummings and Stevens, J.J.

Dates: Argued: April 17, 1973. Decided: August 20, 1973.

Opposing
Counsel: James R. Streicker
33 North Dearborn, Suite 930
Chicago, Illinois 60602
312/263-0345

The case involved the application of the effective waiver rule to a state prisoner's federal claim concerning his statement to police. The Court of Appeals upheld the argument that the petitioner was foreclosed from pursuing his claim. I researched and wrote the brief and presented oral argument to the Court.

(10) People v. Wipfler, 68 Ill. 2d 158 (1977)

Before: The Supreme Court of Illinois

Judges: Underwood, Ward, Goldenhersh, Ryan, Moran, Clark
and Dooley, J.J.

Dates: Argued: June 1977. Decided: October 5, 1977.

Opposing
Counsel: Michael J. Goldstein
189 West Madison, Suite 1000
Chicago, Illinois 60602
312/346-0945

This case presented an opportunity for the Court to clarify the appropriate standard of custody to determine the applicability of Miranda v. Arizona, 384 U.S. 436 (1966) and to apply this standard to a difficult set of facts. The Court adopted the standard suggested by the People. I researched and wrote the brief and offered oral argument to the Court.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of

your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As a prosecuting attorney I negotiated pleas of guilty in cases of homicide, narcotics violations and financial crimes. I represented the State in pretrial hearings leading to settlement of a major injunctive action against United States Steel Corporation for water pollution. As Director of Revenue, I invoked and guided a process of consultation concerning the proper interpretation of a new law exempting food and drugs from taxation. The interpretation I adopted and the process which led to it allowed a relatively smooth transition through a substantial change in tax law. Moreover, I ruled on important questions of apportionment of taxable income to Illinois, exemption of food processing equipment from sales tax and the liability of organizations for taxes on property and sales. In the legislative process, I was a significant participant in several contested matters, e.g., the comprehensive change of criminal law to determinate sentencing, the attempt to invoke a limitation on property tax increases, the regulation of investigations of police misconduct.

II. Financial Data and Conflict of Interest (Public)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I shall recuse myself from any case in which the actions of a state agency taken during my tenure with those agencies are material to the outcome of the case. I shall further abide fully by accepted standards of recusal in cases where I or my spouse have a financial or other significant interest in the outcome of the case or are related to the parties or attorneys in the case.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   I presently write or edit published casebooks and other written materials and teach, both with and without compensation. I intend to continue this work if the fulfillment of judicial duties leaves adequate time to do so.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work pending litigation?

   Not applicable

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   See attached statement and schedules.

NET WORTH SCHEDULES

JAMES B. AND MARGARET ZAGEL

Assets

Listed Securities

Wife	107	Shares	Swift Ind.	700.
Wife	151	Shares	Magna Group Inc.	2,900.
Husband	218	Shares	Speed-o-Print	1,600.
Husband	250	Shares	XRG Corp.	-0-.
Joint	873.5	Shares	Dreyfus Tax Exempt Bond Fund	11,450.

Real Estate Owned

Joint	Residence - 340 West Barry, Chicago	375,000.
Wife	Clinton County, Illinois Farmland	33,750.
Wife	Washington County, Illinois, Farmland	75,000.

Cash Value Life Insurance

All American Life Insurance	4,284.
M.O.N.Y	11,050.

Other Assets

Wife	Harris Bank IRA	6,000.
Wife	Stein Roe Cash Res. IRA	6,500.
Husband	Stein Roe Cash Res. IRA	9,000.
Husband	Stein Roe Stock Fund IRA	4,500.

Liabilities

Real Estate Mortgage

Mortgage on Principal Residence - First National Bank of Chicago	$248,000.

Other Liabilities

Insurance Policy Loans	
All American Life	3,697.
M.O.N.Y.	961.

Estate of Ethel S. Zagel

Assuming that the Last Will of my mother, known to me, is admitted to probate and its terms carried out, the following assets will be distributed to me less $24,000 in specific bequests and estate debts and expenses ($10,000 to $20,000). Securities are valued as of the date of death.

I.	Cash In Banks		$134,000.
II.	U.S. Government Securities		
	2 Treasury Notes - Series Y - 1987		20,000.
	1 Treasury Note - Series P - 1987		5,000.
	5 Treasury Notes - Series U - 1987		50,000.
III.	Listed Securities		
	423 Shares	Commonwealth Edison	13,430.
	10 Shares	Commonwealth Edison Preferred (C)	210.
	136 Shares	Borg Warner Corp.	4,692.
	171 Shares	Eastmet Corp.	171.
	132 Shares	Ferro Corp.	4,785.
	166 Shares	Fluor Corp.	3,136.
	869 Shares	Speed-o-Print Corp.	5,648.
	346 Shares	Homestake Mining	10,207.
	13 Shares	York Int.	213.
		Commonwealth Edison Bond (Mortgage Bond - Series 37) (face value)	10,000.
		Commonwealth Edison Bond (1st Mort. Bond Series 30) (face value)	10,000.
IV.		Unlisted Securities	100,000.
		14.28% of VMR Corporation (Privately held by family members of my mother's family)	
V.		Cash Value Life Insurance	10,903.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand and in banks	86,000.00
U.S. Government securities—add schedule	0
Listed securities—add schedule	16,650.00
Unlisted securities—add schedule	
Accounts and notes receivable:	
Due from relatives and friends	
Due from others	
Doubtful	
Real estate owned—add schedule	483,750.00
Real estate mortgages receivable	
Autos and other personal property	60,000.00
Cash value—life insurance	15,334.00
Other assets—itemize:	
IRA Accounts	26,000.00
Partnership Assets	2,500.00
Total assets	690,234.00

LIABILITIES	
Notes payable to banks—secured	
Notes payable to banks—unsecured	
Notes payable to relatives	
Notes payable to others	
Accounts and bills due	
Unpaid income tax	
Other unpaid tax and interest	
Real estate mortgages payable—add schedule	248,000.00
Chattel mortgages and other liens payable	
Other debts—itemize:	
Insurance Policy Loans	4,658.00
Total liabilities	252,658.00
Net worth	437,576.00
Total liabilities and net worth	690,234.00

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	
On leases or contracts	
Legal Claims	
Provision for Federal Income Tax	
Other special debt	

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

Note: On October 7, 1986, my mother died. I am executor under her will and her principal heir. The estate will not be closed for at least one year. In the interest of completeness, I have appended a list of those assets to which I believe I am heir.

III. General (Public)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe the duty of a United States District Judge is to apply the law found in statutes and the decisions of the United State Supreme Court, and the relevant Court of Appeals, to the cases assigned to his or her court. He or she has the same duty to follow the statutes and decisions of state courts when state law must be applied in federal cases. The judge must be neutral among the parties, understand the evidence and render his or her best decision on the case presented without undue delay.

The judge must understand and accept the significant restraints on his or her authority. A judge, much like a police officer who has just cause to overhear a phone conversation, needs a warrant. The judge's warrant is not obtained in the same way as a police officer's, but the judge's need for the warrant is no less vital. The judge searches legislation and decided cases for the warrant. Justification for judicial action cannot legitimately arise from the notion that taking such action would be a "good idea" or that the judge possesses the power to take it. Imposition of general duties upon the government and the people is the function, subject to some constitutional limitations, of the elected legislatures. Moreover, the judiciary is ill equipped to administer other institutions on a continuing basis. The federal trial judges must take great care not to exceed the authority that Congress and the decisions of courts of review have conferred upon them.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I have always sought to insure that my actions as a public official were taken without regard to any factor other than the facts of the case and the application of the law to those facts. My decisions to prosecute or not to do so or to invoke or not to invoke the other powers given me by law have never been motivated or exercised in light of improper considerations of economic status, ethnic origin, gender, race or religion. I have treated all persons as equal under the law.

The public service positions I have held precluded the performance of legal representation of private individuals. Conflicts of interest would have prohibited a good deal, if not all, of such work and the posts I held required all of my time. Prior to government work, when I was in law school, I devoted a great deal of my time to the defense of the indigent. I was a member and an officer of the Harvard Voluntary Defenders, a student group whose members under the existing law provided legal defense for indigents accused of crimes in the Massachusetts District court and assisted indigent prisoners desiring to challenge their convictions.

Rec'd 2/12/87-RG

ABA

AMERICAN BAR ASSOCIATION

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(312) 988-5000

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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JAMES B. ZAGEL
United States District Court
Northern District of Illinois

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of James B. Zagel for appointment as Judge of the United States District Court for the Northern District of Illinois.

A substantial majority of our Committee is of the opinion that Mr. Zagel is "Qualified" for this appointment. The minority found him to be "Well Qualified".

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

CONFIRMATION HEARING ON: DAVID BRYAN SENTELLE, DAVID S. DOTY, RICHARD J. DARONCO, AND REENA RAGGI

WEDNESDAY, APRIL 1, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 1:48 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy (acting chairman) presiding.

Also present: Senator Thurmond.

Staff present: Steven J. Metalitz, special counsel; Robert Short, minority chief investigator; Stephanie Hamlett, nominations clerk.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The committee will come to order.

Senator Durenberger and Senator Boschwitz are here on behalf of David Doty, to be District Judge of Minnesota.

Who would like to start?

STATEMENT OF HON. DAVE DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. Mr. Chairman, if I could start the thing, I am the senior Senator so I guess I could start. I want to express my appreciation to you. I was just telling our candidate here that you and I have spent an awful lot of time together in the last few years and it is a pleasure to see you in another environment.

Senator LEAHY. We have windows you can look out of here, unlike the Intelligence Committee.

Senator DURENBERGER. That is right.

Senator LEAHY. The confinement room.

Senator BOSCHWITZ. When he is not spending time with you, Mr. Chairman, I am spending time with you in the Agriculture Committee.

Senator LEAHY. People are going to start talking in Minnesota. [Laughter.]

Senator LEAHY. I could not think of two better people to spend time with. Go ahead, Senator.

Senator DURENBERGER. Well, Mr. Chairman, it is a privilege for me to appear before the Committee today to urge your approval of Dave Doty as Federal District Judge for the District of Minnesota, and to introduce you to his wife Mary and to his sons, Bob and John, who are also here today.

As an attorney in Minnesota for nearly twenty years, I had the privilege of knowing every Federal Judge to serve in the District over the past 30 to 35 years. They are a very distinguished group of jurists.

To a Minnesota lawyer, the names Devitt, Larson, Alsop, McLaughlin, Renner, Murphy, Magnuson and Rosenbaum symbolize integrity, fairness and legal scholarship, and soon the name David Doty will be added to that list and I am sure he will only enhance the reputation of the Federal District bench in our State.

As a member of the bar, I feel a special responsibility to maintain the high standards of the Federal Judiciary. The quality of the Federal bench in Minnesota today is due in no small part to a non-partisan selection process that places a premium upon merit.

The best example of that non-partisan tradition occurred in 1979, when Rudy and I came to the Senate. At that time there were two openings on the Federal bench in Minnesota. The State had two Republican Senators and the President was a Democrat and the Vice President a Minnesota lawyer.

What could have been a difficult political battle quickly became a search for high-quality lawyers with a demonstrated commitment to excellence on the bench. The two persons selected in 1979, Judges Renner and Murphy, have served with great distinction and I look forward to watch Dave Doty follow that tradition.

Mr. Chairman, rather than discussing in detail Mr. Doty's many professional qualifications, I am submitting a written copy of his résumé and would ask that it be included in the record.

Senator **Leahy**. Without objection.

Senator **Durenberger**. It is sufficient to point out that his days as an editor of the prestigious Minnesota Law Review, through his fine work in the area of continuing legal education, Dave Doty has demonstrated a commitment to outstanding legal scholarship. His legal ability made him one of the finest lawyers I have ever known.

After graduating from law school, he joined a small firm in downtown Minneapolis which was founded several years earlier by a group of young lawyers. The firm now known as Popham, Haik, Schnobrick, Kaufman & Doty has ended up with more than 75 lawyers today, with offices in Minneapolis, St. Paul, Denver, and Washington, D.C. The remarkable success of that firm is testimony to Dave Doty's professional ability.

His ability has been recognized by his peers in Minnesota as well. In 1975, he was elected President of the Hennepin County Bar Association, the largest county bar association in the State. In 1984, he was elected President of the Minnesota State Bar Association.

Mr. Chairman, if I was looking only at professional qualities, this job would be easy, because in Minnesota we are blessed with an abundance of fine lawyers. To be granted the responsibility of a Federal judge, however, a person must possess certain personal attributes, such as candor, intellectual honesty, restraint and humility. David has all of these qualities and, combined with his fine judgment, they will serve him well on the bench.

Mr. Chairman, I would like to strongly recommend David Doty for this judgeship. He is a credit to his profession and he will, I am sure, serve with great distinction on the Federal bench.

I thank you for the opportunity to testify.

Senator LEAHY. Thank you very much.

Senator Boschwitz?

STATEMENT OF HON. RUDY BOSCHWITZ, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator BOSCHWITZ. Thank you, Mr. Chairman.

I join in Senator Durenberger's endorsement of Dave Doty. Dave has practiced law in Minnesota for over a quarter of a century. He spent six and a half years in the Marines prior to beginning the practice of law. I frankly know of Mr. Doty's firm very well because it has represented some business associates who purchased part of my business and it is really known as one of the premier firms of the Minnesota bar.

Senator LEAHY. By your "business," you are referring to the Boschwitz plywood empire of the Great Northwest?

Senator BOSCHWITZ. When that empire underwent severe stress, the buyers of a portion of that empire were represented by Mr. Doty's firm.

Senator LEAHY. I see.

Senator BOSCHWITZ. They are tough negotiators, I might say, which will make him a good judge.

As my colleague, Senator Durenberger, pointed out, he was first President of the Hennepin County Bar Association, which is our largest county, and then more recently President of the Minnesota Bar Association.

Mr. Chairman, I can assure you that Dave Doty is held in the highest regard, not only by the senior Senator and myself, but by Minnesotans in general, his choice will be highly lauded not only by the bar but by many in Minnesota who have come to know him because of his very broad community activities as well as activities of other members of his family over any number of years.

So I commend him to you and I hope that his confirmation will proceed expeditiously.

Thank you.

Senator LEAHY. Thank you very much.

Mr. Doty, it has always been the tradition of this Committee to put a great deal of weight on the opinions of the two Senators from a nominee's State, and certainly both Senators who have been here with you are both men whose opinions carry a great deal of weight in this body. You could not have asked for a more glowing or forthcoming kind of introduction or recommendation from the two Senators who sit there with you.

I know that the distinguished senior Senator from North Carolina is here and I was wondering, Senator Thurmond, if you would have no objection, I thought what we might do is for the moment excuse Mr. Doty so that Senator Helms could introduce Judge Sentelle, who is here.

Senator THURMOND. I have no objection. I think you ought to take Senators and release them as soon as you can.

Senator LEAHY. I know that both Senator Durenberger and Senator Boschwitz have other committee commitments.

I should mention in that regard, Mr. Doty, when Senator Durenberger and I served on the Intelligence Committee, then we could always say we have another committee because that committee always met in secret and nobody knew whether we met or not. But I do know that both of these Senators have other commitments.

Senator Helms, I know that you are also on a tight schedule, so I would——

Senator **Helms**. Thank you, Mr. Chairman.

Senator **Leahy** [continuing]. You might come forward and introduce Judge Sentelle.

Senator **Helms**. I will not talk about me and my shadow, I will talk about me and my——

Senator **Leahy**. Is Senator Sanford here, too? I know that he was coming.

Okay. Senator Helms, please go ahead, sir.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator **Helms**. I will talk about me and my hay fever.

Mr. Chairman and Senator Thurmond, Senator Sanford asked me to make clear to this distinguished Committee that I am speaking for him in total enthusiastic endorsement of Judge Sentelle.

It is a privilege, Mr. Chairman, to appear before this distinguished Committee and present the Honorable David B. Sentelle, who is presently a U.S. District Judge for the Western District of North Carolina.

Judge Sentelle is here today with his wife Jane and their three daughters, Sharon, Reagan and Rebecca. Now, as is obvious, Judge Sentelle is no stranger to this Committee. He was before you in the fall of 1985 in connection with his nomination to become a U.S. District Court Judge, and the Senate confirmed him for that position and he has served with distinction on the Federal bench since that time.

This year, President Reagan, with my wholehearted endorsement, decided to elevate Judge Sentelle to the U.S. Circuit Court for the District of Columbia. In my judgment, he could not have made a better choice. My only regret is that the people of North Carolina are losing an outstanding? judge and a fine gentleman, but their loss is the country's gain.

I will not go through his entire biographical sketch, but he is a native of Canton, North Carolina. He was graduated from Enka High School in Buncombe County in 1961. He earned his BA from the University of North Carolina in 1965, and his law degree from the same university, with honors, in 1968, and he served as an editor of the North Carolina Law Review.

Then he practiced law from 1968 to 1970, and was an Assistant U.S. Attorney from 1970 through 1974. From 1974 to 1977, he served as a State District Court Judge. He resumed the private practice of law in 1977, which he continued until he went on the Federal District Court bench in 1985.

Let me say this about a young man whom I have known for a long time. I have never known anybody with more character, better temperament, excellent training, and experience than Dave

Sentelle. He is well-qualified, Mr. Chairman and Senator Thurmond, to assume the duties of a U.S. Circuit Judge, and I urge the Committee to give him your prompt and favorable consideration. And in that, as I said at the outset, I am joined by Senator Sanford.

Thank you very much.

Senator **Leahy**. Thank you very much, Senator Helms.

Again, Senator Thurmond, if you have no objection, I notice that Senator D'Amato is here to——

Senator **Thurmond**. I think that is fine, to take all of the Senators first.

Senator **Leahy**. Thank you.

Senator Helms, thank you very much. I know that you have a busy schedule. Again, I apologize for the delay in opening this hearing.

Senator D'Amato, you are here with two nominees. Most of us, of course, are always satisfied to come here just with one nominee, but Senator D'Amato, coming from a much larger State, usually does things in a larger fashion.

Senator **Thurmond**. Mr. Chairman, I might say that he gets more judges than anybody else.

Senator **Leahy**. He does. In fact, Senator D'Amato has the ability usually to get more of just about everything than anybody else. That is said not as a criticism but just with a great deal of admiration and envy from one who comes from a little State just across the lake.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator **D'Amato**. Mr. Chairman, if I might be permitted to be so bold and presumptuous, I would say that the people of Vermont have not done badly as a result of the leadership displayed by the Chairman, not only in terms of eloquence in presentation but also of legislative efforts which have benefited the people of Vermont. I am pleased and delighted to have the opportunity to be before you as Chairman for the first time and, of course, with our distinguished colleague and Chairman for the past six years, Senator Thurmond, who has always been so very gracious in his attempts to aid us in a better way.

Senator **Leahy**. We are delighted to have you here. Now why do you not get on with your statement before this record gets so redundant with praising each other that that recording machine will self-destruct.

Senator D'Amato.

Senator **D'Amato**. Mr. Chairman, Senator Thurmond, members of the Committee, I am deeply pleased and honored to present two distinguished nominees to this Committee.

At the outset, I would ask that my entire statement be placed in the record as if read in its entirety.

Senator **Leahy**. Without objection, so ordered.

Senator **D'Amato**. Mr. Chairman, the Eastern District of New York and the Southern District of New York are probably two of the busiest districts throughout the entire country. They have heavy caseloads, complex matters, and both districts have produced candidates and judges of superior quality.

That is why I am delighted to speak today on behalf of Judge Richard Daronco and Reena Raggi. Both have exemplary records in terms of private practice, as well as governmental service and judicial experience.

Reena Raggi, before entering private practice, served in an exemplary capacity, during 7 years of stewardship in the United States Attorneys office in the Eastern District of New York. She served as Chief of the Narcotics Section and Chief of the Special Prosecutions Section, and lastly as the United States Attorney by appointment of the Eastern District Board of Judges.

Reena Raggi has proven herself to be a tough prosecutor with the fortitude which only comes from the intense experience in a highly active jurisdiction.

Today, Reena's mother and father are here at this hearing today. Their encouragement has meant so much to her and helped her distinguish herself not only as an outstanding prosecutor but also as a Phi Beta Kappa graduate of Wellesley College, as a Cum Laude graduate of Harvard Law School, and during those early days of her legal career.

Mr. Chairman, concurrence of her nomination I believe will demonstrate a well-placed confidence in the abilities of this new generation of Federal judges.

I might point out that Reena was the first woman to be a judge in the Eastern District, that she has had the support I believe, if not written, is certainly communicated in every sense by every single judge of the Eastern District.

Never before have I had so many distinguished members of the Judiciary, from both parties, actually seek me out to tell me of her capabilities, to tell me of her qualifications, and to recommend to my Committee that Reena Raggi be considered for this most important position.

So I know that it must be a great source of pride to her parents.

Mr. Chairman, I am equally pleased and delighted to have in person Judge Daronco, who is presently a sitting New York State Supreme Court Justice, where he not only administers and hears trials but also, as a result of the Chief Judge of the Court of Appeals, Judge Wapler, is the Deputy Chief Administrative Judge of courts outside of New York City. Such is a recognition of his talent, a recognition of his commitment to the jurisprudence system, to the judiciary of the State of New York.

He is a graduate of Providence College. And I might say, Mr. Chairman, they did not fare too well against our Syracuse orange men in the quarter finals.

Senator **Leahy**. I was out of town a couple nights ago. How did Syracuse do, incidentally? [Laughter.]

Senator **D'Amato**. A tragic conclusion to a brilliantly played game. [Laughter.]

Mr. Chairman, Judge Daronco has continued his academic record. He is a graduate of Albany Law School, and thereafter his educational interest as it relates to the law are carried out as an adjunct professor at Fordham University School of Law and Pace

University School of Law and as an adjunct professor at Iona College.

It is sixteen years of judicial experience that Richard Daronco brings to the Federal system, sixteen years as a family court judge, county court judge, Supreme Court judge, and now as a distinguished administrator of the courts of New York.

Mr. Chairman, I am delighted to be able to commend Judge Daronco to this distinguished Committee as a nominee of our President for the important post of Federal judge of the most prestigious Southern District.

Mr. Daronco has with him today his family, his wife and son and his mother. I know they are very supportive and proud. Also, Reena has here her husband, David, who is also a distinguished prosecutor in the office of the Southern District. So, Mr. Chairman, I am delighted to be able to participate and have the opportunity of placing and recommending for your favorable consideration these two outstanding candidates who I believe will set distinguished records as Federal judges.

I would not be a bit surprised that if in the fullness of time either or both are elevated to higher courts, Mr. Chairman.

Thank you.

[The prepared statement of Senator D'Amato follows:]

RICHARD DARONCO

REENA RAGGI

CONFIRMATION SPEECH

MR. CHAIRMAN:

I AM PLEASED TODAY TO APPEAR BEFORE THE JUDICIARY COMMITTEE IN SUPPORT OF TWO GREAT NEW YORKERS AS FEDERAL DISTRICT JUDGES. BOTH CANDIDATES NOMINATED BY THE PRESIDENT ARE OUTSTANDING IN THEIR OWN RIGHTS AND HAVE EARNED THE ENDORSEMENT OF THE NEW YORK STATE BAR AND THEIR COLLEAGUES IN THE EASTERN DISTRICT AND THE SOUTHERN DISTRICT OF NEW YORK, RESPECTIVELY. IT IS SIGNIFICANT THAT THESE TWO JUDICIAL DISTRICTS WHICH GENERATE SOME OF THE HEAVIEST CASELOADS IN THE NATION ALSO CONTINUE TO PRODUCE CANDIDATES OF CONSISTENTLY HIGH MERIT AND IMPECCABLE CREDENTIALS.

REENA RAGGI, BEFORE ENTERING PRIVATE PRACTICE LATE LAST YEAR, HAD SERVED AN EXEMPLARY APPRENTICESHIP DURING SEVEN YEARS IN THE UNITED STATES ATTORNEY'S OFFICE IN THE EASTERN DISTRICT AS THE CHIEF OF THE NARCOTICS SECTION, THE CHIEF OF THE SPECIAL PROSECUTION SECTION, AND, LASTLY, AS THE UNITED STATES ATTORNEY BY APPOINTMENT OF THE EASTERN DISTRICT BOARD OF JUDGES. REENA RAGGI HAS PROVEN HERSELF TO BE A TOUGH PROSECUTOR WITH THE FORTITUDE WHICH ONLY COMES FROM INTENSE EXPERIENCE IN A HIGHLY ACTIVE JURISDICTION.

TODAY I SHARE THE PRIDE OF REENA'S MOTHER AND FATHER, WHO ARE AT THIS HEARING, WHOSE ENCOURAGEMENT MEANT SO MUCH TO REENA AS A PHI BETA KAPPA GRADUATE OF WELLESLEY COLLEGE AND AS A CUM LAUDE GRADUATE OF THE HARVARD LAW SCHOOL, AS WELL AS DURING THOSE EARLY YEARS OF HER LEGAL CAREER.

MR. CHAIRMAN, CONCURRENCE OF HER NOMINATION WILL DEMONSTRATE A WELL-PLACED CONFIDENCE IN THE ABILITIES OF THIS NEWEST GENERATION OF FEDERAL JUSTICES.

MR. CHAIRMAN, THE SOUTHERN DISTRICT OF NEW YORK IS FORTUNATE TO HAVE AS A PRESIDENTIAL NOMINEE, JUDGE RICHARD J. DARONCO. PRESENTLY A NEW YORK STATE SUPREME COURT JUSTICE, HE IS THE DEPUTY CHIEF ADMINISTRATIVE JUDGE OF COURTS OUTSIDE OF NEW YORK CITY. A GRADUATE OF PROVIDENCE COLLEGE AND THE ALBANY LAW SCHOOL, JUDGE DARONCO CONTINUES HIS INTEREST IN THE ACADEMIC AND EDUCATIONAL ASPECTS OF THE LAW AS AN ADJUNCT PROFESSOR AT FORDHAM UNIVERSITY SCHOOL OF LAW AND PACE UNIVERSITY LAW SCHOOL AND AS AN ADJUNCT PROFESSOR AT IONA COLLEGE.

HOWEVER, IT IS THE ALMOST SIXTEEN YEARS OF JUDICIAL EXPERIENCE AS A FAMILY COURT JUDGE, COUNTY COURT JUDGE, AND SUPREME COURT JUDGE THAT DISTINGUISH THIS OUTSTANDING CANDIDATE. THE COMMENDATION OF HIS PEERS AT THE BAR AND OF THE ELECTORATE ON THREE SEPARATE OCCASIONS IN EVER-INCREASING JURISDICTIONS DEMONSTRATES THE REPUTATION AND QUALIFICATIONS OF JUDGE DARONCO. THE WIDE EXPERIENCE AND DIVERSITY OF HIS INTERESTS ENSURES ME THAT THE SOUTHERN DISTRICT WILL BENEFIT FROM THE CONFIRMATION OF DICK DARONCO.

MR. CHAIRMAN, THANK YOU FOR ALLOWING ME TO PARTICIPATE IN THESE PROCEEDINGS.

Senator LEAHY. Thank you very much, Senator D'Amato, and I know from my earlier discussions with you that you have spent a great deal of time looking at both of these nominations. You have told me in private the same as you told us here in public, of your very, very strong support for both of them and I appreciate that very much.

Again, Senator Thurmond, if you have no objection, I know that Senator D'Amato also has a horrendous schedule—

Senator THURMOND. No, I certainly have no objections. We are very honored to have you with us, Senator.

Senator D'AMATO. Thank you, sir.

Senator THURMOND. I know of the great dedication that you have for the people of your State and I want to commend you.

Senator D'AMATO. Thank you very much, Mr. Chairman and Senator Thurmond.

Senator LEAHY. Thank you very much.

We will go back and begin with David Sentelle, who is the nominee for U.S. Circuit Judge for the District of Columbia Circuit.

Judge Sentelle, if you would step forward, please. Please raise your right hand.

Do you swear the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge SENTELLE. I do.

TESTIMONY OF HON. DAVID B. SENTELLE, A NOMINEE TO BE U.S. CIRCUIT JUDGE, DISTRICT OF COLUMBIA CIRCUIT

Senator LEAHY. Judge, do you also have members of your family here?

Judge SENTELLE. I do, Senator.

Senator LEAHY. Would you please introduce them to us?

Judge SENTELLE. All right. My wife, Jane.

Senator LEAHY. Please stand up, Mrs. Sentelle.

Judge SENTELLE. My daughters Sharon, Rebecca and Reagan.

Senator LEAHY. We welcome all four of you here, and I am sure this must be a very proud moment for all of you to be here. You also get a chance to see the cherry blossoms this time of year.

Thank you for being here.

Judge, I want to ask a couple of questions. The first ones occur to me primarily because you are being nominated for a position on the bench here in the District of Columbia. Are you admitted to practice before the Court to which you have been nominated?

Judge SENTELLE. I am not admitted to the Circuit Court for the District of Columbia. I was, when practicing, a member of the Circuit Court of Appeals bar of the Fourth Circuit, but not of the District of Columbia Circuit.

Senator LEAHY. Are you admitted to practice before any of the courts in the District of Columbia?

Judge SENTELLE. Well, the United States Supreme Court.

Senator LEAHY. We will consider that a national court, but what about any of the District Courts, either municipal, Federal, or others?

Judge SENTELLE. No, I am not.

Senator **Leahy**. Have you ever tried a case before a court in the District of Columbia other than the U.S. Supreme Court?

Judge **Sentelle**. No, sir.

Senator **Leahy**. Have you ever appeared before any such court in connection with any kind of litigation?

Judge **Sentelle**. I have not.

Senator **Leahy**. Now, because you are not a member of any of the District of Columbia courts, have not tried a case and have not appeared in any way in any of those courts, did the Justice Department raise any question about this during the time that you were being reviewed for nomination to go on what really is the highest court in the District of Columbia, other than the U.S. Supreme Court?

Judge **Sentelle**. Not as such. There was some discussion of the fact that that Court's function, that is, the D.C. Circuit Court of Appeals for the District of Columbia's function deals a great deal with appeals of administrative law and questions of Federal law that create precedent and follow precedent for the entire country, that that body of law, therefore, is rather fungible with the Federal courts in which I have practiced for a large part of my career and with the administrative appeals that I have dealt with one way and another during my career also.

Senator **Leahy**. But no specific questions from the Justice Department about your ties to the District of Columbia?

Judge **Sentelle**. Not that I recall.

Senator **Leahy**. And what about the American Bar Association, when they interviewed you concerning this nomination, did they talk at all about your ties to the District of Columbia?

Judge **Sentelle**. Not to my recollection. I had an extended conversation with a representative of the ABA, wherein I believe he noted that most of the judges appointed to this court during our joint lifetime have not been connected with the District, and he personally saw no problems since it was not a court that dealt principally with local matters.

Senator **Leahy**. Why do you speak of its decisions being fungible with the rest of the country? I have never quite thought of it in exactly those terms. There are, though, rules and customs of the local bar that may be indigenous here. How do you plan to acquaint yourself with the rules and customs of the local bar if you are confirmed?

Judge **Sentelle**. Mr. Chairman, insofar as they are applicable to the appellate procedure, I have reviewed the procedures of other appellate courts when I have either argued before them or sat by designation on the Fourth Circuit, I have been able to adapt myself to the customs of the bar where I have had to appear as an attorney or I have sat as a judge and I do not see any insurmountable object in the District of Columbia as opposed to anywhere else.

Senator **Leahy**. By all accounts that I have read, you served with a great deal of distinction in your home State of North Carolina. You have written eloquently about your ties to the South, your feelings about that. I have also been told that a lot of your colleagues in North Carolina will be sorry to see you go. Why leave?

Judge **Sentelle**. I did not hear the end of your question.

Senator LEAHY. Why leave North Carolina? You must be feeling you are kind of tearing up roots to do that. Why leave your native State and come to the District of Columbia.

Judge SENTELLE. Mr. Chairman, I am very honored to be considered by the President and this Committee for appointment to what I believe to be the second most important court in this country, that has more to do with the maintenance of valid precedent and the establishment of valid precedent for the continuation of the American rule of law beyond the 20th Century than any other court that I might be connected with.

While I will always be a North Carolinian in a great many ways, I also will be an American and this is the court of the Capital of my Nation and I would be honored and proud, despite the fact that it means leaving North Carolina to come to the Nation's Capital to serve in that capacity.

Senator LEAHY. Now, according to your questionnaire, about 80 percent of your trial experience has been in criminal cases. The docket of the D.C. Circuit, of course, is overwhelmingly civil in nature. About 3 or 4 percent of the appeals involve criminal matters. Do you feel that your experience is going to hinder you in handling predominantly a civil docket?

Judge SENTELLE. No, sir, Senator. That 80 percent number comes in terms of number of cases. As far as time spent, I began my legal career with an insurance defense firm where we did almost exclusively civil practice. While I was with the U.S. Attorneys Office, where I made some of those numbers, I also represented agencies of the United States in civil and appellate matters. On the State bench, I heard both civil and criminal cases. As a practitioner, while the terms of number of cases would make it probably 80 percent criminal, that is skewed because each civil case generally took longer average time than each criminal case on the average, so that I would say probably a 60-40 criminal would be a more realistic percentage if we were using hours spent, rather than numbers of cases. Also, part of my practice was administrative, generally dealing with State and property law, rather than Federal. I did represent some Federal employees in their disagreements with the Federal Government in administrative matters. I have had about as rounded a career as I think anybody can bring to a bench, and I do not see any problem.

I do think the D.C. Circuit could stand to benefit by my criminal experience, because several recent appointees do not have much criminal experience. While speaking of a fairly small percentage of the docket, nonetheless, there is no case more important to the litigant than a criminal case and I would think I could use that experience on that bench.

Senator LEAHY. Lastly, do you belong to any organization that has membership policies that discriminate against women or members of minority groups?

Judge SENTELLE. Mr. Chairman, I belong to the Masonic Lodge, which has no women members. I know that Senator Thurmond is also a member of that body, as have been several Presidents, including both Roosevelts and President Truman. There are no women members. That is a fraternal order of men who call each other brother and have for centuries. My family has been in it for centuries and to that extent the answer would be yes. Other than that, I know of none, no.

Senator LEAHY. Does the Masonic Lodge that you belong to also discriminate against members of minority groups?

Judge SENTELLE. Not to my knowledge.

Senator LEAHY. I have looked up fraternal organizations in the Greenwood Encyclopedia of American Institutions, and it states that in the United States an applicant for membership in Masonic groups must be 21 or older, male, white, and believe in a supreme being. Is that your understanding of the membership policies of the group to which you belong?

Judge SENTELLE. I do not know of the white question as being in the policies of the Grand Lodge of North Carolina. If it is, I do not know it.

Senator LEAHY. Well, as I read further in the same reference work, it says that the Masonic order to which you belong does not admit blacks. Is that true?

Judge SENTELLE. If it is true, I do not know it.

Senator LEAHY. Well, are there any blacks in——

Judge SENTELLE. No, sir.

Senator LEAHY. Have you ever heard of any in there?

Judge SENTELLE. Senator, there are black Masons but I have never known of any in the lodge to which I belong, but there are black Masons.

Senator LEAHY. Well, the same reference work asserts that "white Masonry in the United States does not officially recognize black Masonry." It continues, "regardless of the way and manner that Negro Free Masonry arose in America, it is today regarded as spurious and illegitimate."

Have you ever been to meetings in other Masonic Lodges, joint meetings or visiting meetings?

Judge SENTELLE. Mr. Chairman, I know there are black members of some predominantly white Masonic Lodges. I do not know of any in North Carolina, but I know there are some.

Senator LEAHY. Have you ever been to a Masonic Lodge where you have seen black members?

Judge SENTELLE. I have not.

Senator LEAHY. And never have in yours?

Judge SENTELLE. No, sir.

Senator LEAHY. The same reference work states that some principles "are unequivocally accepted by all Masons. One of these is that no woman can ever become a Free Mason." One Masonic publication asserts, "A woman to become a Free Mason is as impossible as a man to become a mother or a leopard to change its spots." Does that accurately reflect your views?

Judge SENTELLE. Senator, I think that accurately states the policy of the Masonic Lodge. It is a fraternal association of brothers and there are no women in the fraternity.

Senator LEAHY. But does that accurately reflect your view?

Judge SENTELLE. Well, I think I answered that, in that what you stated to me was that no woman could become a Mason, and I said yes, that is true, no woman can become a Mason.

Senator LEAHY. A commentary of the American Bar Association's Code of Judicial Conduct states it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex or religion. Do you agree?

Judge SENTELLE. If that is construed as barring judicial membership in fraternal organizations, then I disagree.

Senator LEAHY. Do you disagree with the Code of Judicial Conduct when it states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race?

Judge SENTELLE. Yes, I do.

Senator LEAHY. Do you feel that a judge should be allowed to hold membership in an organization that discriminates on the basis of race?

Judge SENTELLE. I am not sure I understood the first question. I do not think a judge should hold membership in an organization that discriminates on the basis of race. I may have oppositely understood what you said the first time.

Senator LEAHY. Maybe I misunderstood your answer. Let me go back.

A commentary of the American Bar Association's Code of Judicial Conduct states it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of—I will take them one by one—on the basis of race. Do you disagree with that?

Judge SENTELLE. I do not disagree with that.

Senator LEAHY. On the basis of sex, do you disagree with that?

Judge SENTELLE. If that is intended to exclude membership in fraternal organizations, then I disagree with it.

Senator LEAHY. On the basis of religion.

Judge SENTELLE. If I may explain my answer, I disagree with that because I think every church can be construed as discriminating on the basis of religion. The Catholic Church does not admit Baptists, and the Baptist Church does not admit Catholics, and I really do not think the Code of Judicial Standards should be meddling in what churches and religious organizations we belong to.

Senator LEAHY. If I might read the ABA's commentary on that, it says "a judge must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so clearly and willingly. It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." And they indicate that to pick that out, to tell whether that is so, you would look at the history of the organization's selection of members and other relevant factors.

Judge SENTELLE. I think the key word, Mr. Chairman, may be "invidious."

Senator LEAHY. Well——

Judge SENTELLE. I do not really view the Knights of Columbus or the Masonic Order or other fraternal organizations as being invidiously discriminatory. They are associations of brothers.

Senator LEAHY. Well, some Masonic organizations, according to the reference material we have, would not admit blacks. Do you think that that is discrimination which is invidious?

Judge **Sentelle**. If in fact a Masonic order does not admit blacks, then I can see your point, I think yes, it would be invidious, but I know of no such policy in the North Carolina Grand Lodge.

Senator **Leahy**. But you also know of no blacks that have ever been Masons.

Judge **Sentelle**. That is correct.

Senator **Leahy**. If your nomination is confirmed, do you plan to maintain your membership in these Masonic organizations?

Judge **Sentelle**. Senator, I do really think that if my membership raises any question in anybody's mind, if I resign to get this job it would not alleviate those questions.

Senator **Leahy**. Did the Justice Department question you concerning your membership?

Judge **Sentelle**. The Justice Department issued a questionnaire that asked, as I recall—and, remember, I filled out about four questionnaires for this judgeship and four for the last one. As I recall, each of those questionnaires asked what organizations I belong to and asked if I belong to any organizations that discriminated on the basis of race or sex.

I believe on each such questionnaire I listed everything I belong to, and I did note that the Masonic Order is a fraternal order that does not include women members.

Senator **Leahy**. Or blacks, apparently.

Judge **Sentelle**. Senator, again, I know of no such policy in the North Carolina lodge.

Senator **Leahy**. If it was determined that Greenwood's Encyclopedia of American Institutions is accurate and that blacks are excluded from Masonic organizations to which you belong, do you think there is any danger that your impartiality in cases alleging race or sex discrimination might reasonably be questioned?

Judge **Sentelle**. Senator, it might be questioned, whether or not I resigned or not, but I think if you will check my history on the bench and in practice and in general, I do not think anyone who knows me, white or black, questions my fairness on the basis of race.

Senator **Leahy**. Senator Thurmond?

Senator **Thurmond**. Judge Sentelle, there are several hundred-thousand Masons in this country, are there not?

Judge **Sentelle**. Yes, sir, Senator.

Senator **Thurmond**. Do you know of a Mason that has been accused of discrimination just because he joined the Masons?

Judge **Sentelle**. Not to my knowledge, not before today, Senator.

Senator **Thurmond**. I have been a Mason since 1925.

Judge **Sentelle**. Yes, sir.

Senator **Thurmond**. I am proud to be a Mason.

Judge **Sentelle**. I am, too, Senator.

Senator **Thurmond**. They believe in the supreme being, they believe in God and the teachings in that order are of very high principle.

In 1985, I believe you appeared before, and were approved by, this committee, and were confirmed by the full Senate and this question was not raised at anytime, was it?

Judge **Sentelle**. That is correct, this question was never raised in the 1985——

Senator **Thurmond**. I have never heard it raised before. In the 32 years I have been in the Senate, I have never heard the question raised or even asked about the Masons being discriminatory. Any person who thinks the Masons is discriminatory is just off base, they do not know what they are talking about.

This gentleman has been confirmed already. His record had been gone into very carefully at that time and I have heard of no misbehavior on his part since, so so far as I am concerned he is well qualified to be promoted to the Circuit Court.

I understand you made a good record as District Judge and I have no reason to think you would not make a good record as Circuit Judge and I hope you will be confirmed and I hope you will enjoy your service on the bench.

This is a very important court, as you said, probably one of the most important courts in the land, next to the Supreme Court.

I have nothing further, Mr. Chairman. Thank you.

Senator **Leahy**. Thank you, Senator.

The record will remain open. I understand that there may be other Senators who have questions for the record.

Thank you very much, Judge.

Judge **Sentelle**. Thank you, Senator.

[Submitted material follows:]

Delivered to Justice
Friday 4/3

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CHARLES E. GRASSLEY IOWA
ARLEN SPECTER, PENNSYLVANIA
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MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
DENNIS W. SHEDD, MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

April 1, 1987

Hon. David B. Sentelle
c/o John Bolton, Assistant Attorney General
Office of Legislative and
Intergovenmental Affairs
U.S. Department of Justice
Washington, D.C. 20530

Dear Judge Sentelle:

In order to supplement the hearing record on your nomination to be U. S. Circuit Judge for the District of Columbia Circuit, please respond to the following questions. Since your testimony was taken under oath, please attach to your responses an affidavit attesting to the accuracy of your responses.

1. You discuss in your questionnaire responses your successful defense of a capital murder case in which you were appointed to represent the defendant. (State v. Quick) While you were in private practice, how frequently did you accept court appointments in indigent cases?

2. In November, 1974, you were appointed to fill an unexpired term as a state court judge on the North Carolina District Court. In November of 1976, you were elected to a four-year term on the same court. Then, in Novemeber of 1977, you resigned from the court, with about three years remaining in your term. Why did you resign from the state court?

3. Obviously no one can predict the future. But what are your present intentions with respect to your tenure on the D.C. Circuit if you are confirmed?

In addition, please furnish the Committee with a copy of the constitution, charter, by-laws or any other document which describes the requirements for admission to the membership of each of the following organizations to which you belong:

(a) Excelsior Masonic Lodge #261
(b) Scottish Rite Masonic Body
(c) Oasis Temple of the Shrine

Please deliver your response to the Committee at Room SD-226, Dirksen Senate Office Building. If you have any questions concerning this request, please direct them to Steven J. Metalitz of the Committee staff ((202)224-8191).

Sincerely,

S/
PATRICK LEAHY
United States Senator

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

I, David B. Sentelle, first duly sworn, depose and say:

1. With reference to the frequency of my acceptance of representation of indigent criminal defendants:

While the frequency of such acceptance varied within the time of my private practice, I can say with a fair degree of accuracy that I averaged at least one indigent representation for every six months spent in private practice. The frequency was lowest within the four-year period surrounding the representation of Ben Lester Quick referenced in the original questionnaire response. That reduction in frequency reflects the fact that I and a few other experienced criminal defense attorneys agreed to represent indigent defendants in capital murder cases. The enormous investment of time in each such case and, more importantly, the immense emotional strain involved in capital defense, necessitated a longer break between those representations so that I took one of those cases no more frequently than once every two years. However, I have taken this into account in arriving at the rough estimate above offered; and, would again state with some assurance, that I represented approximately one indigent defendant by appointment for every six months of my private practice. This does not include a large number of other defendants, particularly in serious criminal cases, whom I represented at less than my usual fee when they might not be technically indigent for purposes of being eligible for appointed counsel but were nonetheless unable to afford the quality of representation required by the seriousness of the charges against them.

2. With reference to my resignation from the state bench in 1977:

In 1977, I decided to resign from the North Carolina District Court after having served a total of three years for the following complex of reasons:

At 34 years old, I had never to that time practiced law as a partner in my own firm. I had an opportunity to practice law with a new partnership, pre-existing my joining it only by one year, with attorneys whom I respected and with whom I desired to practice law, one of whom was formerly a colleague on the state district court bench. Because of the then political situation in North Carolina, I had no chance for advancement in the judiciary; and if I wished to advance my career in any fashion, it had to be by leaving the bench. (By way of explanation, North Carolina State judges above the level of district court are chosen in state-wide elections. This has the effect of precluding Republicans from election since Republicans win state-wide elections in this state only in highly visible non-judicial contests. My ascending the bench had originally been due to appointment by a Republican governor after being chosen in a non-partisan poll of the district bar. The Republicans lost the governorship in the election of 1976.) The state district court judgeship at that time was paying less than $30,000 per year. The opportunity with the partnership would not remain open as the then partners, needed someone at that time and not three years further down the road. I could reasonably anticipate and did in fact realize a significant income increase the first full month in practice after leaving the bench. To have turned down that opportunity would have meant essentially making a career decision to stay with a judgeship in which I faced election every four years as a member of a minority party without any realistic hope of advancement and without getting any younger year by year. I, therefore, decided to resign the bench.

3. With reference to my present intention regarding tenure on the District of Columbia Circuit Court of Appeals:

It has been my ambition throughout my legal career and, indeed, even before completing law school to eventually become a member of and establish a career as a member of the federal judiciary. It would be my intention to serve in the federal judiciary either in my present district judgeship or, if confirmed, on the District of Columbia Circuit until I die or retire, whichever comes first.

DAVID B. SENTELLE

Sworn to and subscribed before me, this the 7 day of April, 1987.

Notary Public

My Commission expires:

6-22-91

Senator **Leahy**. We have in connection with this nomination another witness, Paul Friedman, the President of the District of Columbia Bar.

Mr. Friedman, would you please raise your right hand.

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Friedman**. I do.

Senator **Leahy**. Mr. Friedman, I understand you have a statement you wish to make.

TESTIMONY OF PAUL L. FRIEDMAN, PRESIDENT, DISTRICT OF COLUMBIA BAR

Mr. **Friedman**. Yes. Thank you, Mr. Chairman, Senator Thurmond. My name is Paul L. Friedman and I am the President of the District of Columbia Bar, which has 45,000 members and is the third largest bar in the United States.

I also speak today on behalf of several of the voluntary bar associations in the District of Columbia.

Senator **Leahy**. I understand that you have a statement. The whole statement will be made a part of the record, but I understand also you can also summarize it in five minutes.

Mr. **Friedman**. I will do that.

Senator **Leahy**. Thank you.

Mr. **Friedman**. As I said, I speak also on behalf of several of the voluntary bar associations in the District of Columbia, including the Women's Bar Association, the Hispanic Bar Association, the Washington Bar Association, which is the black bar association in the District of Columbia, the Washington Council of Lawyers, the National Lawyers Guild, the Bar Association of the District of Columbia, the Trial Lawyers Association of Metropolitan Washington, D.C., and the D.C. Chapter of the Federal Bar Association.

We are not here to oppose Judge Sentelle. We are here to make two points which his nomination dramatizes, as have others before. One is that, despite the fact that we are here in a jurisdiction which has 45,000 lawyers as members of the bar, the current court includes only one person in our view who is a genuine product of the local legal community. Every administration, going back to Franklin Roosevelt, has brought people from outside this jurisdiction and made them judges of this Court of Appeals.

Judge Sentelle was introduced by the Senator from North Carolina. There is no Senator from the District of Columbia to introduce a nominee to this Court.

The second point, and it is a very important point, is that all eight appointments that President Reagan has made to this Court are white males, and all six nominees to the United States District Court for the District of Columbia in the last six years have been white males.

Seventy percent of the citizens of the District of Columbia are black. We have the largest contingent of women lawyers of any jurisdiction in the country. We have the largest contingent of minority lawyers, blacks and Hispanics, particularly blacks, of any jurisdiction in this country.

We are concerned and the voluntary bars that I am speaking for are concerned that no deference has been given to that fact, and so we have two problems. We have the third largest bar in the country, with 45,000 members, and yet none of them are considered good enough apparently for appointment to the Circuit Court of Appeals in our own jurisdiction; and, secondly, that no minorities and no women have been given consideration.

These are serious problems. We have a distinguished trial bar in the District of Columbia. We have a distinguished bar of what one would consider national practitioners. Indeed, an awful lot of lawyers in this city came here to practice law because of the national practice that the firms of this city have for them, and the national practice that the government have for them. Yet that is precisely the kind of practice that people tell us is why lawyers from other parts of the country must be brought in.

This is a national Court of Appeals. If it is a national Court of Appeals, this is the place where the best people for that Court are to be found. But it not just a national Court of Appeals, it is a court which has appeals from trials, civil and criminal, in the United States District Court for the District of Columbia and, as I said, we have a distinguished trial bar that practices in that Court, that knows the practices and procedures of the trial courts in this jurisdiction. Yet they are not considered for the highest court, other than the Supreme Court, in the District of Columbia and, as Judge Sentelle said, the second most important court in the country.

We have distinguished trial judges on the U.S. District Court as well and on the Superior Court of the District of Columbia, and distinguished local appellate judges, but there is no hope for them to be appointed to the second most important court in the country, unless presumably they moved out of the District of Columbia for a few years and then perhaps they could be considered.

Part of the problem, as I said, is that we do not have a Senator, we do not have someone to make our case for us. And it is interesting, every time I come up here to testify or to listen to testimony, I see the nominees introduced by their home State Senator and the home State Senator in turn says how much deference he pays to the view of the local bar association.

Well, no one pays attention to the views of the local bar in the District of Columbia. There are 8,000 to 10,000 women lawyers in the District of Columbia and more than 2,500 black lawyers and 600 Hispanic lawyers. Women and minorities can be found among the senior and junior partners in the city's largest and most prestigious law firms. We have the largest number of both women partners and minority partners in major law firms of any city in the country, and certainly that is true within the Federal Government ranks and in our Federal and local trial courts.

Our fundamental proposition is that no one is listening to us and that we have got something worth listening to. Here in the District of Columbia are the diversity, the talent and the experience necessary to enable any administration of either party to select those who meet its particular tests for appointment and at the same time to assure that the U.S. Court of Appeals for the District of Columbia Circuit continues to be inhabited by the best and the brightest, by men, by women, by blacks and by other minorities.

This is an issue of great importance to the bar of 45,000 strong, to the city, to the community, and ultimately we suggest to the credibility and prestige of the second most important court in the Nation.

We have tried to send our message to this and prior administrations and we hope that this Committee will help us do so.

Thank you very much.

[The statement follows:]

STATEMENT OF PAUL L. FRIEDMAN
PRESIDENT OF THE DISTRICT OF COLUMBIA BAR
ON THE NOMINATION OF
DAVID B. SENTELLE
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. Chairman:

My name is Paul L. Friedman. I am an attorney in the private practice of law in the District of Columbia, a former Assistant United States Attorney here and a former law clerk to a Judge of the United States Court of Appeals for the District of Columbia Circuit. I am currently the President of the District of Columbia Bar, which is now the third largest state bar association in the country, with a membership of over 45,000 lawyers. I appear before the Committee on behalf of the Bar with respect to the nomination of David B. Sentelle to the United States Court of Appeals for the District of Columbia Circuit. I am also authorized to say that the Bar Association of the District of Columbia, the Women's Bar Association, the Washington Bar Association, the Hispanic Bar Association, the Washington Council of Lawyers, the National Lawyers Guild and the Trial Lawyers Association of Metropolitan Washington, D.C. support the Bar's position on this subject.

This is not the first occasion on which the District of Columbia Bar through its President has appeared before this Committee to discuss appointments to the District of Columbia Circuit and the resulting composition of the Court. The Bar has always taken an active interest in the Court and has attempted to make its views known to this Committee, to the White House and to the Justice Department.

Let me make clear that I do not appear before the Committee to challenge the nomination of David Sentelle. The position we take today is one the Bar has espoused for many years and relates only indirectly to Judge Sentelle. As in the past, the individual abilities or intellect of the particular nominee are not the issue. Rather, I appear before the Committee today to challenge the criteria used and, of equal importance, the significant factors wholly ignored by the Executive Branch in making appointments to the D.C. Circuit. The D.C. Bar is concerned over the composition of the Court which has resulted from the application of these criteria by this Administration.

Frequently, the Bar has felt that its plea to be given an appropriate voice in the process and its reflections on criteria pertinent to the appointees have fallen on deaf ears. While our primary concerns remain unanswered, in the case of Judge Sentelle at least members of the Bar and the courts of the District of Columbia have been given an adequate opportunity through the American Bar Association Federal Judiciary Committee to comment on Judge Sentelle's qualifications -- an opportunity not always provided with respect to other recent nominees to the D.C. Circuit in whose cases the process has been much too hurried. In the past the D.C. Bar has also stressed the need to balance the Court with persons who have extensive trial experience rather than primarily academic experience. In that regard, Judge Sentelle's nomination is certainly a step in the right direction; he was a trial lawyer and is now a trial judge. Nevertheless, the D.C. Bar and its members have very serious concerns that have not been addressed and, indeed, have been completely ignored in the case of this and prior appointments.

First, despite the Court's presence in a locale which boasts the third largest state bar association in the country and has 45,000 lawyers licensed to practice here, the current Court includes only one person who is a genuine product of the local legal community. The Bar is distressed by that fact.

Second, despite the large number of women and minority lawyers in the District of Columbia, all eight Reagan appointees to the United States Court of Appeals for the District of Columbia Circuit and all six nominees to the United States District Court for the District of Columbia have been white males. The result of those appointments has been the creation of a Court which represents neither the local community nor the country as a whole.

As I have said, the District of Columbia Bar has a membership in excess of 45,000 lawyers. It includes a wide range of Republicans as well as Democrats, conservatives and liberals, blacks, whites and hispanics, younger and older lawyers, and a large proportion of women in addition to men. Furthermore, the practices of D.C. Bar members are equally diverse, ranging from matters of purely local interest to those of national and international significance. D.C. Bar members are trial lawyers and law professors, experts in administrative law and experts in constitutional law. The D.C. Bar is a fertile source for prime judicial candidates of every vintage, background, gender, race and experience. Yet this enormous pool of legal talent has been largely ignored as a source for appointments to the D.C. Circuit. Instead every President since Franklin Roosevelt has gone outside the District of Columbia to find candidates for the D.C. Circuit. But no President until President Reagan has had eight vacancies to fill.

One argument frequently made in support of the appointment of non-D.C. lawyers, and the virtual absence of D.C. practitioners from the pool of nominees, is that the D.C. Circuit is a national court. An analysis of the Court's cases may or may not support that premise. The D.C. Circuit undoubtedly hears many cases, most notably appeals from agency action, which have arisen elsewhere and may have little or no connection with purely local concerns. However, the Court also handles both criminal and civil appeals from the United States District Court for the District of Columbia. These cases render the D.C. Circuit functionally indistinguishable from a Circuit Court of Appeals anywhere else in the country, whose judges are selected from the local legal communities within the Circuit and with substantial input from the bars of the affected states.

But even if the D.C. Circuit were viewed as a national court, that fact would only serve to strengthen, not diminish, the argument that nominees to the Court should come from the ranks of D.C. lawyers. Since at least the mid-1960's the District of Columbia Bar has been a truly national bar that includes a large number of lawyers with practices that reach across the country in terms of geography, scope, subject matter and impact. Indeed, many of these lawyers decided to practice law in the nation's capital precisely because of the national practice that has developed here. They are the lawyers best versed in administrative law, constitutional law and in many of the so-called national issues that confront the D.C. Circuit.

If the D.C. Circuit is indeed a national court, the nation as well as this city should not be denied access to the immense talent, experience, diversity and knowledge of members of the D.C. Bar. D.C. Bar members will not be appointed to the federal courts in other jurisdictions. If not appointed to the D.C. Circuit this enormous storehouse of talent will be lost to the federal appellate court system forever.

Furthermore, the District of Columbia Circuit does not deal solely with appeals from decisions of administrative agencies and other national issues. It considers a large number of appeals from the United States District Court for the District of Columbia, including appeals from civil and criminal cases which have been resolved on motion or after trial. It is therefore significant that the D.C. Bar includes a great trial bar which is one of the best sources of talent for appointment to the D.C. Circuit: men and women who understand not only legal theory but the practice of law, the rules of evidence, and civil and criminal procedure. It is also significant that there are many truly outstanding trial judges on our U.S. District Court and outstanding judges on our local trial and appellate courts. What incentive is there for them if none is ever considered for appointment to the U.S. Court of Appeals here?

To be truly great, an appellate court needs a balance which includes some individuals with extensive practical trial experience. The D.C. Circuit could benefit from the addition of more nominees with such experience. So why not "kill two birds with one stone" and elevate a judge from our local or federal trial bench or appoint one of the great trial lawyers of our community? The historical prestige of the D.C. Circuit requires a true blend of all backgrounds. Candidates drawn from the vast resources of the D.C. Bar can undoubtedly add to the prestige of the Court and its stature as a national court.

Failing the "national court" argument as a mechanism for excluding local practitioners, the only one that remains is that of tradition. The D.C. Bar is fully aware that there has been a long practice followed by every President at least since Franklin Roosevelt to look outside the Bar of this city for candidates for appointment to the United States Court of Appeals for the District of Columbia Circuit. Every Administration has to a large extent ignored the talent, experience, diversity and knowledge of the now nearly 45,000 members of our Bar and has opted instead for lawyers from other parts of the country. These individuals, while in many cases extremely talented and capable, nevertheless have been brought to Washington from other jurisdictions, and Judge Sentelle is but another example. Without any real prior knowledge of or experience with the District of Columbia they have been nominated to the D.C. Circuit where they affect the lives and destinies of the citizens of the one jurisdiction that has no elected representative to participate in the advise and consent processes of the United States Senate.

Retired, defeated or incumbent Congressmen from around the country have long constituted one pool of candidates to the D.C. Circuit. President Roosevelt appointed Congressman Fred Vinson of Kentucky, and President Truman nominated Senator Bennett Champ Clark of Missouri. President Eisenhower named Senator John Danaher of Connecticut, and President Nixon appointed former Congressman George MacKinnon of Minnesota. President Carter nominated Congressman Abner Mikva of Illinois, and President Reagan appointed former Senator James Buckley of New York.

At least in recent years, the world of academia has been perhaps the most popular source of candidates for appointment to the D.C. Circuit, but only one President has turned to a local law school for judicial nominees. President Roosevelt selected Professor Henry Edgerton of Cornell and Wiley Rutledge, Dean of the Iowa Law School. President Truman nominated George Thomas Washington, another Cornell professor, and President Kennedy named Carl McGowan, Counsel to the Governor of Illinois and former Northwestern University law professor.

President Johnson appointed Spottswood Robinson, who at the time of his appointment to the District Court was Dean of the Howard University Law School. President Carter appointed Harry Edwards from the University of Michigan and Ruth Bader Ginsburg from Columbia. President Reagan has appointed four law professors: Robert Bork from Yale Law School, Antonin Scalia from the University of Chicago, Stephen Williams from the University of Colorado, and Douglas Ginsburg of Harvard Law School.

There have also been lawyers from other parts of the country brought to Washington to serve briefly in the Justice Department and then appointed to the D.C. Circuit. Over the years such lawyers have included Assistant Attorney General Thurman Arnold of Connecticut, Assistant Attorney General David Bazelon of Illinois, Assistant Attorney General Warren Burger of Minnesota, former Assistant Attorney General Malcolm Wilkey of Texas and most recently, Assistant Attorney General Douglas Ginsburg of Illinois.

Finally, President Kennedy selected a United States District Court Judge from another part of the country for the D.C. Circuit, J. Skelly Wright, at the time a sitting federal judge in Louisiana. And now President Reagan has nominated to our Circuit David Sentelle, currently a U.S. District Court Judge not in the District of Columbia but in Asheville, North Carolina.

Local practitioners have largely been ignored in all of this. There have been a few appointed, but not many. Yet they have been among the stalwarts of the Court: E. Barrett Prettyman, James Proctor, Walter Bastian, Harold Leventhal, Roger Robb and Patricia Wald. But a handful in half a century is not a record of which to be proud. It is a record about which our Bar has grown increasingly concerned and for which there now appears to be no rational basis, if indeed one ever existed.

So far as history shows, no President has thought it important even to consider the local ties of any of his nominees to the federal appellate court here. Knowledge of the District of Columbia and its laws and commitment to the District and its people all seem to have been ignored. Many recent appointees to the Court have never even been admitted to practice law here, much less before the very Court on which they were appointed to serve. Judge Sentelle is no exception. Rather, with no Senatorial courtesy (indeed, no Senator at all) to protect District of Columbia residents, Presidents and Attorneys General for half a century have nominated to the D.C. Circuit whomever they chose from wherever they happened to hail. President Reagan has even appointed three individuals to our Circuit whose state Senators apparently had rejected them for appointment to the Circuit from which they came.

We in the District of Columbia have no home state Senator to either block or champion a particular nominee. We have no senatorial privilege to assure that D.C. lawyers will not be closed out of our own judiciary. We do, however, have a very distinguished and increasingly frustrated Bar that is tired of being ignored when it comes to appointments to our own Circuit.

I am not arguing that the D.C. Circuit should be composed solely of lawyers from the D.C. Bar or solely of lawyers with substantial ties to this jurisdiction. I strongly suggest, however, that it is time for this Administration and those that follow to break with the irrational and unsupportable tradition of the past and to look first and foremost to members of our Bar for nominees to the D.C. Circuit. The Reagan Administration has ignored that plea on each of the eight occasions when there has been a vacancy on the Court. I urge this Committee to join the D.C. Bar in sending it the message I am suggesting.

I would also urge this Committee to look very closely at the present composition of the United States Court of Appeals for the District of Columbia Circuit. The Court currently lacks balance. During his Administration, President Reagan has nominated eight white males to the D.C. Circuit. During his Administration he has nominated six white males to the U.S. District Court for the District of Columbia. While many of these men have already demonstrated that they are outstanding judges, the point is that the President has nominated no women, no blacks and no hisparics in a city whose population is seventy percent black. It is high time that the race and gender of appointees to the Court be scrutinized and efforts made to assure that the composition of the Court reflects the country, the community and the legal environment in which it functions. The country, the city and the legal profession are not comprised solely of white males.

The District of Columbia Bar undoubtedly contains one of the largest single pools of women and minority lawyers in the country, including approximately 8,000 to 10,000 women, 2,500 black and 600 hispanic lawyers. These women and minorities represent a disproportionately high number of the women and minority group members currently licensed to practice law in the United States. They range from private practitioners to government officials and are diverse in terms both of seniority and experience and of social and political philosophies and perspectives.

Women and minorities can be found among both the senior and junior partners at this city's largest and most prestigious law firms. Indeed Washington has the largest number of both women partners and minority partners at major law firms of any city in the country. The federal and D.C. governments also contain highly qualified women and minority lawyers at all levels of seniority and responsibility, as does the local judiciary. The leadership of the D.C. Bar itself reflects the diversity of the D.C. legal community, having been led last year by Fred Abramson, a black attorney, and the preceding year by Marna Tucker, a woman. Of 20 officers and members, the Board of Governors of the D.C. Bar includes ten women and six minority lawyers.

But even accepting the Reagan Administration policy of seeking judicial appointees from outside the ranks of local lawyers, women and minority lawyers as a whole should not be disqualified. Over 103,000 women, 25,000 black and 11,000 hispanic lawyers are licensed to practice law in the United States. Many of these are seasoned, bright and well qualified to serve at the federal appellate level. With the enormous diversity which this group of women and minority lawyers represents it should be possible to locate and nominate to the

D.C. Circuit women and minority lawyers who are in tune with the philosophy of whichever Administration happens to be in office at the time.

In sum, right here in the District of Columbia are the talent, the diversity and the experience necessary to enable any Administration to select those who meet its particular tests for appointment and at the same time to assure that the United States Court of Appeals for the District of Columbia Circuit, the second most important court in the country, continues to be inhabited by the best and the brightest, by men, women, blacks and other minorities. This is an issue of great importance to the Bar, this city and, ultimately, to the credibility and prestige of the Court.

The Bar appreciates the opportunity to make its views known and certainly to have those views seriously considered in the federal judicial appointment process. So, on behalf of the D.C. Bar, I thank you for the opportunity to appear and I again strongly urge the Committee and the Administration to look in the first instance to the District of Columbia Bench and Bar as a source for appointments to the United States Court of Appeals for the District of Columbia Circuit. I also ask that you consider carefully the makeup of the Court today. It is essential that women and minorities be included among its members to assure the necessary balance and credibility which are essential to its continued prestige and effective functioning.

Thank you.

Senator **Leahy**. Thank you, Mr. Friedman. I also share your concern that every person nominated to the federal courts in the District of Columbia by this administration has been a white male. I am sure that there are also many other courts that share in that distinction around the country, so if you are seeking comfort, you are not being singled out here in the District of Columbia.

You have testified about the large number, the unusually high proportion of both women and minority lawyers. Now, is it your point that these D.C. bar members have been excluded from consideration not only for D.C. judgeships but apparently for any judgeships?

Mr. **Friedman**. I do not know the answer to that, except that obviously the place that they would most likely be considered would be in the place where they practice law and they have not been considered for the United States Court of Appeals for the District of Columbia Circuit.

Clearly, members of our bar have been considered and appointed to the U.S. District Court for the District of Columbia, but in this particular administration all six of those appointees have been white males.

Senator **Leahy**. Now, the administration says it is making a very diligent search for minority and women candidates. You have probably the highest proportion of minority and women candidates of any bar in the country. There are 2,500 black lawyers, 600 Hispanic lawyers——

Mr. **Friedman**. I think I said 8,000 to 10,000 women lawyers.

Senator **Leahy** [continuing]. 8,000 to 10,000 women lawyers, some serving as partners in prestigious firms. To your knowledge, have any of them been approached to be a judge, to accept an appointment to a judgeship, or have they turned down all the appointments?

Mr. **Friedman**. I do not think they have turned down all the appointments. I know that there have been names of women on some lists that have been considered. I do not know how far they have gotten in the process.

Senator **Leahy**. I do not necessarily mean to put words in your mouth, but does it suggest that the administration claim that it is making a diligent search for minority women candidates may be somewhat disingenuous in the case of the District of Columbia? From my days of trying cases, I know that would probably come under the heading of a leading question, but——

Mr. **Friedman**. I try cases, too, and I would agree.

Senator **Leahy**. Agree that it is a leading question or agree with the concept

Mr. **Friedman**. That it is a leading question.

Senator **Leahy**. But let us be serious for a moment. If we use the District of Columbia as an example, I know of no bar in the country with the same percentage of women lawyers and minority lawyers as the D.C. bar. If there is another one out there, I am not aware of it.

Mr. **Friedman**. You are right.

Senator **Leahy**. And one would think if indeed diligent searches are being made for women and minority candidates, they would come from here. This does not go to Judge Sentelle's qualifications, but rather to the selection process itself. I am asking you, are you aware of those who have been told they would be nominated but may have turned it down?

Mr. **Friedman**. I am not aware of any such people. I am aware of some people who have been considered somewhere along in the process but I do not believe they have ever been offered a nomination, to my knowledge. I may be——

Senator **Leahy**. And certainly I am not aware of any that have come before this Committee.

Mr. **Friedman**. I am aware of the fact that the Women's Bar Association of the District of Columbia has made efforts and has made suggestions to the Justice Department of names of people that they might consider.

Senator **Leahy**. You have heard about "fungible courts". Do you think that the courts are that nationally uniform, that a judge from any State can go out and sit in any other regional Circuit Court?

Mr. **Friedman**. I do not think so, Mr. Chairman, and indeed I recall a Supreme Court case a year or two ago when now Chief Justice Rehnquist noted that one of the reasons that deference is given to Circuit Courts of Appeals around the country on State law questions is because by and large the judges of those Circuit Courts come from the jurisdictions of the State laws they are interpreting.

Now, here that is not so if we do not take people from our U.S. District Court, our Superior Court of the District of Columbia, and our local D.C. Court of Appeals and put them on the D.C. Circuit, and if we do not take people from our local trial bar and put them on the D.C. Circuit.

Senator **Leahy**. I have a number of questions I will submit to you about how the D.C. bar might send a message to the Justice Department. It may well have to come from the various voluntary bar associations in the District, but I will send it to you. I wish you would take a look at them and send your thoughts back to me.

Judge Sentelle may be simply a bystander and has to listen to this debate, and I would suggest that this is not easy for him, but there is a concern. I have expressed, incidentally, a similar concern in past administrations, both Democrat and Republican, that there is a great deal of talent within the bar in the District of Columbia, talent that is very often overlooked in judicial appointments. My questions to you are simply looking for ways that that might be gotten across to the Justice Department and to the new Justice Department that will take over two years from now in whatever administration follows this one.

Mr. **Friedman**. I appreciate that. Let me underscore your point that this debate and discussion in our view does not relate to Judge Sentelle's qualifications, and on a personal note he is someone whom I have known for ten years and it is a little uncomfortable for me to be making these points in this context.

Senator **Leahy**. He has been making a lot of notes. I would suggest you may be in a lot of trouble the first time you come before the Court.

Mr. **Friedman**. That is quite possible.

Senator **Leahy**. Let the record reflect that I was being facetious.

Mr. **Friedman**. I have made these points to the sitting judges as well and I have not argued a case recently, but I do on occasion.

Senator **Leahy**. I think they are valid points, though. I think they are valid points and I think that at some point the administration, whatever administration, has got to realize that they have got a lot of talent within three or four miles radius of the White House.

Mr. **Friedman**. Thank you very much for your comments as well, and I look forward to responding to your questions.

Senator **Leahy**. Thank you.

[The questions of Senator Leahy follow:]

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

April 1, 1987

Paul L. Friedman, Esq.
President, District of Columbia Bar
1707 L Street N.W., Sixth Floor
Washington, D.C. 20036-4202

Dear Mr. Friedman:

In order to supplement the hearing record on your testimony before the Judiciary Committee on April 1, please respond to the following questions. Since your testimony was taken under oath, please attach to your responses an affidavit attesting to the accuracy of your responses.

1. Has the D.C. Bar suggested to the Justice Department any nominees whom it felt ought to be considered for vacancies? Specifically, did the bar suggest any candidates for the vacancy for which Judge Sentelle has been nominated?

2. Has the D.C. Bar established any mechanism through which lawyers in the District of Columbia can give their views on nominees to the D.C. courts? As you know, many local and state bars do have committees to review nominees. Both the New York nominees at the hearing at which you testified were evaluated by the Association of the Bar of the City of New York. Is there a similar mechanism in the District of Columbia?

3. On March 19, 1987, the President made a nomination to the District Court for the District of Columbia. Is the D.C. Bar planning to give the Committee the benefit of its opinion on this nominee? If so, how will that be done?

4. Since the membership in the D.C. Bar is mandatory, your organization may be somewhat constrained from using the dues paid by all D.C. lawyers to express a particular view on a issue such as a judicial nomination. But what about the voluntary bar associations on whose behalf you testified? Did they communicate their views on Judge Sentelle's nomination to the Justice Department? Do you know if they are prepared to take a position on the Sentelle nomination now? Do they plan to give the Judiciary Committee comments on the other D.C. nomination now pending?

Please deliver your response to the Committee at Room SD-226, Dirksen Senate Office Building. If you have any questions concerning this request, please direct them to Steven J. Metalitz of the Committee staff ((202)224-8191).

Thank you once again for your testimony.

Sincerely,

S/

PATRICK LEAHY
United States Senator

THE DISTRICT OF COLUMBIA BAR

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May 13, 1987

BY HAND

Steven J. Metalitz, Esq.
Committee on the Judiciary
United States Senate
Room SD-226
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Metalitz:

Enclosed is my response to Senator Leahy's letter to me of April 1, 1987 which is intended to supplement the hearing record on my testimony before the Committee of April 1 concerning the nomination of Judge David B. Sentelle to the United States Court of Appeals for the District of Columbia Circuit. It consists of a 13-page affidavit under oath and sixteen exhibits thereto. You may or may not wish to include the exhibits in the hearing record, as I have summarized them in my affidavit.

I apologize to the Committee for the delay in responding but thought it important to await the responses of all the relevant voluntary bar associations.

Sincerely,

Paul L. Friedman

Paul L. Friedman

Enclosure

NOTE--Exhibits not printed, they remain on file with the committee.

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AFFIDAVIT OF PAUL L. FRIEDMAN

District of Columbia ss.:

PAUL L. FRIEDMAN, being duly sworn says:

1. My name is Paul L. Friedman, and I am the duly-elected President of The District of Columbia Bar, the mandatory Bar of the District of Columbia which was established by court rule in 1972 and to which all attorneys licensed to practice law in the District of Columbia are required to belong. Currently there are over 45,000 members of The District of Columbia Bar.

2. I submit this affidavit at the request of Senator Patrick Leahy on behalf of the Committee on the Judiciary of the United States Senate. This affidavit is submitted in order to supplement my testimony before the Judiciary Committee on April 1, 1987 respecting the nomination of Judge David B. Sentelle to be a judge of the United States Court of Appeals for the District of Columbia Circuit and, specifically, to respond to the questions put to me by Senator Leahy in his letter of April 1, 1987 (Exhibit A hereto).

3. The District of Columbia Bar has been concerned for some time about the practice of every President since at least Franklin Roosevelt of nominating individuals to the United States Court of Appeals for the District of Columbia Circuit who are not members of The

District of Columbia Bar and are not products of the local legal community. Our concerns have been expressed repeatedly in recent years.

(a) On October 30, 1985, Marna S. Tucker, then immediate past president of The District of Columbia Bar, testified before the Senate Judiciary Committee on the nomination of James L. Buckley to the District of Columbia Circuit. Ms. Tucker pointed out that Mr. Buckley had been opposed by a Senator of his own party for a seat on the Second Circuit and that the Association of the Bar of the City of New York had rated him not qualified. She further stated that there had been insufficient time for Mr. Buckley to be fairly evaluated by members of the D.C. Bar who would appear before him if confirmed and that the American Bar Association's Federal Judiciary Committee had concentrated its investigation on the New York and Connecticut areas. (Ms. Tucker's October 30, 1985 testimony is Exhibit B hereto.)

(b) On November 14, 1985, Frederick B. Abramson, then President of The District of Columbia Bar, wrote to Senator Strom Thurmond, then Chairman of the Senate Judiciary Committee, with respect to Mr. Buckley's nomination. He included with his letter a resolution of The District of Columbia Bar asking that Mr. Buckley's nomination be delayed for thirty days so that the ABA Committee might conduct a thorough investigation of Mr. Buckley within the District of

Columbia. (Mr. Abramson's November 14, 1985 letter is Exhibit C hereto.)

(c) On April 10, 1986, Frederick B. Abramson again wrote to the Chairman of the Senate Judiciary Committee, this time with respect to the nomination of Stephen Williams to the United States Court of Appeals for the District of Columbia Circuit. He pointed out that the Bar was concerned that for a second time a nominee originally considered for another circuit was shifted to the District of Columbia Circuit and that the ABA inquiry had not included discussions with judges and lawyers in the District of Columbia. Mr. Abramson included a formal resolution of The District of Columbia Bar which asked for a delay in consideration of the nomination so that lawyers and judges within the District of Columbia could be consulted about Mr. Williams' qualifications. (Mr. Abramson's April 10, 1986 letter and the accompanying resolution is Exhibit D hereto.)

(d) In the September/October 1986 issue of The Washington Lawyer, the official journal of The District of Columbia Bar, I devoted my President's Page, which I entitled "Time to End a Tradition," to the practice of every President since Franklin Roosevelt of looking outside the Bar of this city in seeking candidates for appointment to the District of Columbia Circuit. I suggested that this and future administrations should make sure that at least every second person appointed to the D.C. Circuit is a District of

Columbia lawyer or judge and that The District of Columbia Bar create its own blue ribbon commission to help the President and Attorney General identify the large pool of talented local lawyers and judges who are available for appointment to the federal courts in the District of Columbia and evaluate the qualifications of those about to be nominated. (My column is Exhibit E hereto.)

(e) On October 1, 1986, I testified before the Senate Judiciary Committee on the nomination of Douglas Ginsburg to the United States Court of Appeals for the District of Columbia Circuit. I pointed out that the D.C. Circuit then included only one person who is a genuine product of the local legal community and that Mr. Ginsburg was yet another outsider who was not even a member of our Bar. I asked that action on the nomination of Mr. Ginsburg be delayed to allow adequate time for the lawyers, the bar associations and the citizens of the District of Columbia to make their views known with respect to Mr. Ginsburg. I was joined in my testimony by seven of the voluntary bar associations in the District of Columbia: the Bar Association of the District of Columbia, the Washington Bar Association, the Women's Bar Association, the Hispanic Bar Association, the D.C. Chapter of the Federal Bar Association, the Washington Council of Lawyers and the D.C. Superior Court Trial Lawyers Association. I testified on October 1, 1986 and the Judiciary Committee voted favorably on Mr. Ginsburg's nomination on October 2. (My testimony of October 1, 1986 is Exhibit F hereto.)

(f) Nathaniel H. Speights, President of the Washington Bar Association, which consists primarily of black lawyers, also testified on October 1, 1986 with respect to the nomination of Mr. Ginsburg. (Mr. Speight's testimony of October 1, 1986 is Exhibit G hereto.)

(g) Lawrence H. Huebner, President of the D.C. Superior Court Trial Lawyers Association, also testified on the nomination of Douglas Ginsburg. (Mr. Heubner's testimony of October 1, 1986 is Exhibit H hereto.)

(h) On April 1, 1987, I testified on the nomination of Judge David B. Sentelle to the United States Court of Appeals for the District of Columbia Circuit. I made two points: First, despite the Court's presence in a locale which boasts the third largest state bar association in the country and has 45,000 lawyers licensed to practice here, the D.C. Circuit includes only one person who is a genuine product of the local legal community. Second, despite the large number of women and minority lawyers in the District of Columbia and in the United States as a whole all eight Reagan appointees to the D.C. Circuit and all six nominees to the United States District Court for the District of Columbia have been white males. I was joined in my testimony by eight of the voluntary bar associations in the District of Columbia: the Bar Association of the District of Columbia, the Washington Bar Association, the Women's Bar Association, the Hispanic Bar Association, the D.C. Chapter of the Federal Bar Association, the Washington Council of Lawyers, the National Lawyers Guild and the Trial Lawyers Association of Metropolitan Washington. (A copy of my April 1, 1986 testimony is Exhibit I hereto.)

4. The District of Columbia Bar has not suggested names of specific persons to the Justice Department whom it felt ought to be considered for vacancies on the United States Court of Appeals for the District of Columbia Circuit or for the United States District Court for the District of Columbia. Specifically, it did not suggest any candidates for the vacancy for which Judge Sentelle has been nominated. While the Board of Governors of the Bar feels that the Bar and its President ought to comment forcefully on the process involved in the nomination and confirmation of judges to our federal courts -- including particularly the disregard of local practitioners, local judges, women and minorities -- some members of the Board think it inappropriate for a mandatory bar to recommend specific candidates for specific vacancies.

5. Leaders of the Bar have communicated individually with both the White House and the Justice Department concerning the qualifications of individuals whose names have surfaced for possible appointment and have also suggested both orally and in writing qualified

candidates for vacancies on the federal courts here. I personally have discussed the importance of appointing local lawyers and judges to the courts with officials of the Justice Department, including Assistant Attorney General Stephen J. Markman, and with former White House Counsels Fred F. Fielding and Peter J. Wallison. I sent a private and personal letter to Assistant Attorney General Markman listing the names of 25 individuals who are members of The District of Columbia Bar who I personally thought would be excellent additions to the federal courts in the District of Columbia and who I believe would meet all of the qualifications -- including experience, competence, party affiliation and philosophy -- that the current Administration appears to have established. I have not shared my letter to Mr. Markman with others and think it would be inappropriate to do so.

6. The District of Columbia Bar has recently established a Standing Committee of the Bar on Federal Judicial Appointments which would consist of seven members appointed by the President of the Bar and confirmed by the Board of Governors. The purpose of the Committee would be to evaluate potential candidates and nominees to the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia and endeavor to secure the appointments of qualified candidates. The Committee shall endeavor to ensure that the interests of

the Bar and the citizens of the District of Columbia are represented. A special committee of the Bar has drafted proposed by-laws for the Standing Committee, and I have recently appointed a small ad hoc committee of the Board to review the draft by-laws and report back to the Board promptly. The Standing Committee should be operational within the next few months.

7. The Senate Judiciary Committee has asked whether the District of Columbia Bar plans to give the Committee the benefit of its opinion on the President's nomination of Royce C. Lamberth to be a judge of the United States District Court for the District of Columbia. Because our Standing Committee is not yet operational, the Board of Governors itself considered the matter at its meeting on April 14, 1987. Consistent with its view that the Board should now limit its public statements on these matters to questions of process and policy, the Board authorized me to advise the Committee with repect to Mr. Lamberth's nomination that while the Bar remains concerned that yet another white male has been nominated to the federal bench here and that no woman or minority has yet been nominated by the Reagan Administration, it is pleased that the President has nominated a local practitioner and a member of The District of Columbia Bar who has had significant trial and litigation experience to this important position. I sent a separate letter to the Commitee with respect to Mr.

Lamberth's nomination on May 8, 1987. (My May 8, 1987 letter is Exhibit J hereto.)

8. Subsequent to my appearance before the Senate Judiciary Committee on April 1, 1987 and with respect to question Number 4 of Senator Leahy's letter of that date, I have communicated with each of the voluntary bar associations who authorized me to speak for them at the April 1 hearing and put to them the questions set forth in paragraph Number 4 of Senator Leahy's letter. Their responses are contained in Exhibits K through P attached hereto, as follows:

(a) The Bar Association of the District of Columbia, the oldest voluntary bar association in the District of Columbia, has written to the White House and intends to write to the Senate Judiciary Committee in support of the nomination of Royce C. Lamberth to become a judge of the United States District Court for the District of Columbia. It has taken no position and filed no separate statement respecting Judge Sentelle's nomination, but it has fully supported and continues to support the position set forth in my testimony concerning Judge Sentelle on April 1, 1987. (A letter from Allen Jones, Jr., President of the Bar Associaton of the District of Columbia, dated April 13, 1986 is Exhibit K hereto).

(b) The Washington Bar Association urges that nominations to the federal bench in the District of Columbia should be reviewed by the local judiciary committees of the bars and states that "the Washington Bar Association's Committee on the Judiciary has never been given the opportunity to review the qualifications of Federal judicial nominees in the District of Columbia," except in recent years but only "after the nomination has all but been confirmed." (A letter from Nathaniel H. Speights, President of the Washington Bar Association, dated May 11, 1987, is Exhibit L hereto).

(c) The Women's Bar Association of the District of Columbia is concerned "that the present Administration continues to nominate only males to the local Judiciary," which does not reflect the composition of the D.C. Bar with its 8,000 to 10,000 women members or the composition of the community. Pointing to studies of gender bias in the courts undertaken by the New York and New Jersey court systems, the Women's Bar Association notes its concern that the continued nomination of only male judges may "perpetuate and contribute to gender bias in the District of Columbia." It notes that those concerns continue with respect to the nomination of Mr. Lamberth to the United States District Court for the District of Columbia, as well as with respect to the nomination of Judge Sentelle to the D.C. Circuit. The Women's Bar Association reports that it has a Judicial Endorsements Committee which responds to inquiries with respect to judicial nominations from the Justice Department and the Federal Bureau of Investigation. It has met with individuals from both the White House and the Department of Justice and has provided them with names of qualified women candidates. (A letter from Bettina M. Lawton, President of the Women's Bar Association, dated April 8, 1987 is Exhibit M hereto.)

(d) The Hispanic Bar Association of the District of Columbia reports that it has taken no position with respect to Judge Sentelle's nomination and does not plan to do so. It is, however, "particularly concerned over the complete lack of minorities among President Reagan's nominees for the D.C. Circuit." It has "sought quietly" to bring to the attention of the White House and the Justice Department the names of outstanding minority lawyers who reside in the District of Columbia, but has been unsuccessful in getting any Hispanic seriously considered for either the D.C. Circuit or the U.S. District Court. The Hispanic Bar is "dismayed that out of an applicant pool of over 12,000 minority attorneys, black, women, Hispanics and Orientals . . . not one has been nominated by this Administration." (A letter from Rafael Diaz, President of the Hispanic Bar Association, dated April 21, 1987 is Exhibit N hereto.)

(e) The D.C. Chapter of the Federal Bar Association wrote a letter to Senator Leahy on April 10, 1987 which noted that it has written to Attorney General Meese, to the President and to Senators Biden and Thurmond about the nomination process and has passed a resolution urging the appointment of individuals who are members of The District of Columbia Bar, who practice in the Washington, D.C. metropolitan area and who are repesentatives of the legal community over which they would preside if confirmed. With regard to Judge Sentelle's qualifications, the D.C. Chapter of the Federal Bar Association noted that it did not have sufficient information to make a judgment. With regard to Mr. Lamberth's nomination to the U.S. District Court, the D.C. Chapter of the Federal Bar Association noted that it strongly endorsed Mr. Lamberth's nomination in a letter to the Attorney General of February 11, 1987. (A letter from Brian C. Murphy, Chairperson, Judicial Selection Committee, D.C. Chapter of the Federal Bar Association, with its attachments, dated April 10, 1987, is Exhibit O hereto.)

(f) The Washington Council of Lawyers has recently inaugurated a program to evaluate nominees for seats on the federal courts in the District of Columbia. It has adopted procedures under which it will gather information about the nominees from a variety of sources. It has discussed its new program with Assistant Attorney General Stephen Markman and with the staff of the Senate Judiciary Committee. With respect to Judge Sentelle's nomination, the Washington Council of Lawyers reviewed his fitness and submitted its views to Senator Biden by letter of April 28, 1987. (A letter from Joseph M. Sellers, President of the Washington

Council of Lawyers, dated April 13, 1987 is Exhibit P hereto.)

I attest to the accuracy of the foregoing responses and declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Paul L. Friedman
President
The District of Columbia Bar

Sworn to before me this
13th day of May 1987.

Marissa V. Ahan
Notary Public

My Commission Expires June 14, 1988

WASHINGTON COUNCIL OF LAWYERS

April 28, 1987

Honorable Joseph Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: Nomination of David Sentelle
to the District of Columbia Circuit

Dear Senator Biden:

The Washington Council of Lawyers, a nonpartisan voluntary bar association committed to the encouragement of pro bono and public interest legal practice and the promotion of equal justice under law, has recently undertaken a program of evaluating nominees to serve as judges on the federal courts in the D.C. Circuit. The first nomination to be examined under this program is that of the Honorable David Sentelle to serve as a judge on the U.S. Court of Appeals for the D.C. Circuit. Because of the press of time, our evaluation of this nomination is based on information provided by Judge Sentelle to the committee as well as other matters of public record, and has not included personal interviews or other sources of information that may be utilized with future nominees. Based on this limited information, we have the following comments.[1]

First, Judge Sentelle appears to have ample training and experience to serve as a judge on the U.S. Court of Appeals. Indeed, we believe that it would be highly desirable for the Court to have the benefit of an additional judge with his substantial level of litigation experience. Moreover, our limited review of Judge Sentelle's opinions as a federal District Court judge has raised no issue in our minds regarding his competence as a judge. Nor

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* Members of the Executive Committee

---

[1] The persons on the panel that reviewed Judge Sentelle's qualifications for the Council are Linda E. Perle, Esquire, Paul M. Smith, Esquire and Allen R. Snyder, Esquire.

are we aware of any issue with respect to Judge Sentelle's personal integrity.

We do, however, have concerns in two areas. First, as stated by Paul Friedman, President of the D.C. Bar, in his testimony at the April 1 confirmation hearing on behalf of several bar groups including the Washington Council of Lawyers, it is unfortunate that the President of the United States has chosen to nominate for the D.C. Circuit yet another person who has no contacts with the District of Columbia. While we do not believe that this factor is enough, on its own, to require opposition to a given nominee at this time, we are very concerned about the virtual absence from the D.C. Circuit of judges who have prior experience working in this local area. The D.C. Circuit is both a national and a local court, and its work could only be improved by the participation of more judges with knowledge of the needs and particular circumstances of the District of Columbia.

Second, we would urge the Committee to look closely at the issue of Judge Sentelle's membership in two local North Carolina chapters of the Masonic Order that, according to press accounts, have no black or female members. The Washington Council of Lawyers believes strongly that federal judges should not belong to private organizations that discriminate on the basis of race or sex -- at least in those cases where membership in the organization has commercial or social significance in a given community.[2] Regardless of whether such a membership affects a given judge's actual conduct of his or her office, it is of symbolic importance to many persons who look to the federal courts to enforce their rights. When a plaintiff comes into federal court alleging racial or sexual discrimination, the outside associations of the judges deciding the case should not be such as to create even an appearance of insensitivity toward the concerns of women or minorities. This reality is reflected in the American Bar Association's Commentary to Canon 2 of the Code of Judicial Conduct, which states that it is inappropriate for a judge to belong to an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Thus, if it is true that the organizations at issue here have policies or practices excluding blacks or women, and those organizations have real commercial or social significance in their local communities, Judge Sentelle should be required to resign from the organizations prior to confirmation.

---

[2] It would be a different case, of course, where a judge works with a single-sex organization such as the Boy Scouts or Girl Scouts.

The only remaining issue, in our view, is whether these memberships are indicative of attitudes toward women and blacks that should disqualify Judge Sentelle from service on the D.C. Circuit even if he were to resign from the groups. In this regard, we suggest that the Committee carefully analyze the national Masonic organization's membership policy concerning women and blacks, the attitude of Judge Sentelle's local chapters toward this issue, and any positions taken by Judge Sentelle himself with respect to the issue. Of course, the Committee should also take full account of any other indicia of Judge Sentelle's personal attitudes toward women and minorities. In this regard, we note that we are concerned about an essay authored by Judge Sentelle -- "Listen and Remember," in Why the South Will Survive, U. Ga. Press, 1981 (copy attached) -- which engages in an extensive discussion of character traits allegedly attributed to "Anglo Saxons," and makes numerous comparisons to other racial groups.[3]

---

[3] See, e.g., id. at 153 ("Or has the Anglo Saxon heard that he doesn't know how to work? Has he heard that the once-proud WASP is now a post-capitalistic drone, lying around the board rooms of the hive while black and Spanish-surnamed bees buzz out to bring him back the honey? The South knows better."); id. at 154 ("Most falsely of all, some say the Anglo-Saxon lacks roots. They claim an African can feel the dark, rich soils of his homeland in the marrow of his bones. They say that Latins and Poles can feel their ancestry pulsing in their veins, but that an Anglo's family tree only hangs on the wall or guarantees membership in the D.A.R. The South knows better."); id. at 154-155 ("How then are we to explain Charley Pride, the black pride of country music? . . . After all, nobody ever said that blacks lack soul, or Latins passion, or Jews a sense of time.").

Moreover, in order to get a complete picture of Judge Sentelle's attitudes toward questions of equal justice, the committee should also assess his many professional activities, including his representation of capital murder defendants at reduced rates, his work on behalf of halfway houses for prisoners, and his work for local service clubs helping the handicapped.

In conclusion, we believe that Judge Sentelle's experience at the bar and on the bench would clearly be sufficient to qualify him for service on the D.C. Circuit. Confirmation is not warranted, however, if the Committee concludes that Judge Sentelle is now a member of organizations that discriminate invidiously on the basis of race or sex, or that his prior activities and writings demonstrate in any way a lack of regard for equal rights under law.

Thank you for your consideration of these issues.

Sincerely,

Joseph Sellers

Joseph M. Sellers, President
Washington Council of Lawyers

cc: Senator Patrick Leahy
Judge David Sentelle

Why the SOUTH Will Survive

by Fifteen Southerners

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Listen and Remember

DAVID B. SENTELLE

SURVIVAL OF THE SOUTH is essential. The South must not die. I do not merely believe this; I know it. I learned it in a country song. Not the first time I heard the song, or the second, or the third. It was just a simple little country song about an old filling station, John's Place, where good old boys sat around and talked, and picked and sang; where the good old boy in charge, a guy named John, employed the young of the community to let them earn a little and, while they were at it, learn a little about life, and work, and music. There was nothing unusual about the song. It would never sell a million copies or make anybody's top forty.

It wasn't until the fourth time I heard it, or maybe the fifth, that I began to wonder why I was listening to this song so many times if it was indeed such an ordinary, unremarkable sort. And it wasn't until I had listened and wondered about it a few more times that I began really to understand why. Much later still I learned from it the importance of the South's survival. Joe Allen wrote "John's" and George Hamilton IV sang it, each with the solid sort of sincerity and realism that only two good ole Southern boys, who had spent a lot of hours in just such a place as John's with just such company as his, could sing and write. Though I had never met Joe Allen and though I was, I think, three thousand miles and a good-sized ocean away from George when I first heard the record, I had spent enough time in the same sort of circumstances to settle into a warm, fraternal embrace of shared recollection from the very first line I heard George sing.

It was a little like the experience of running into a total stranger in a beachfront tavern and finding out after only a little conversation that he not only went to college with your favorite cousin but he used to go out with the same good-looking redhead she once paired you with. Yes, and he even took her to the same restaurant. It was a lot more like getting together with an old best friend you had not seen since high school, and you and he telling each other all about the funny, wonderful things you did together; not only reminding each other of details you had forgotten but each of you remembering for yourselves details that you hadn't really forgotten, but hadn't really remembered in a long, long time.

That song and that insight into my own affection for it first let me realize what it is that makes me love not only George Hamilton IV's singing and that particular song, but country music in general. It is that phenomenon of shared recollection. There is some pleasure in solitary musings on the older contents of your dimmest memory, but there is greater pleasure in sharing with another from your differing perspectives the deep memories you own together. The greater the overlap of your experience, the more articulate your companion in his recollection, the greater the expansion of your satisfaction in his company.

This is true even if the experience recollected is not the same one. Witness the tender, infinite, passionate love of one drunken bum for another. They do not drink to soothe the same consciences, or to alternately fuel and douse the same smoldering fires of the past, but each knows in the main what the other is about. (In case one doesn't, they tell each other over and over.) In the end, although each would fight the world for a bottle of wine, once he has won the prize he readily shares it with his friend.

Just so, although I know that the singer is not crying about the same love that I lost, or the same parent that I mourn, or the same old home that I remember, still the sense, the feeling, the remembrance is so much the same that when he pours out his tale I listen and remember. Not only do I remember, but country music listeners up and down and across the Southland do the same. There are qualities, experiences, lifestyles that are uniquely and generally Southern. We remain an identifiable region, while the Northeast, the Midwest, and the West Coast become increasingly indistinguishable for anything other than climate. Obviously there *are* shared traits that mark us.

Jimmy Carter running for president was conspicuously a Southerner. Ford was in no conspicuous sense a Midwesterner, or Nixon a Westerner. It is no coincidence that Carter, whatever he was as a president, as a man is a lover of country music. He has an identity which other politicians lack. He thrives on the art that marks that identity, and so do Southerners of all classes and strata.

This country music, so generally written, played, and appreciated by Southerners, has become the music of our region precisely because a few of our number can, through it, relate the events that have happened to us all. Country singers express the emotions and the actions that these events have evoked in us all, and they invite the rest of us to share in the old wine of common recollection. When a particular country song becomes unusually beloved, it may be because it is well written, original and well performed; but more than likely, it is also an unusually moving expression of what the Southerners who love it were feeling, consciously or unconsciously, all the time.

If the South loves country music because it sings of experiences that are Southern, how can we explain the fact that increasingly the non-South also loves country music? Why do New Yorkers, Chicagoans, and Californians make pilgrimages to Nashville? How have Johnny Cash, Buck Owens, and Mel Tillis commanded national television audiences? How does George Hamilton IV make his triumphal ambassadorial tours of Canada, South Africa, Ireland, and England? In short, how can the song of the South become so much the song of the whole Anglo-Saxon world? Why, the same way it became the South's—the same only more so. Think again for a moment of the reunited high school classmates. Suppose instead of just remembering with you that both of you used to really give hell to Mrs. Edwards in twelfth-grade English, and that you all had a great time the night you and he and Billy Joe tied a mule in the first stall of the women teachers' lounge, suppose he also remembers and tells you (and your wife, and her mother, and your five kids) that inside that mound of oh-too-solid flesh in which you now appear there beats the heart of a hundred-and-sixty-pound scatback who once ran ninety yards from scrimmage in the last five seconds of the state championship game to score the winning touchdown? (Which was, by the way, your third six-pointer of the night.) Yes, and after the game was over, you caught the very devil for keeping the head cheerleader out until 3:00 A.M.

Don't tell me you wouldn't relish that reunion with an old friend. You might just make your wife and kids hush and listen to him a little longer. It wouldn't even matter if the story wasn't exactly the way it happened, so long as it was somewhere close. You would still remember it while he told it, and you would cherish that memory.

Of such is the popularity of the South's music in the Anglo-Saxon world. And of such is the resultant necessity for the continued existence of the South.

Some writers may tell the Anglo-Saxon that his is a dull and uninspiring tribe. He may hear from some media that he is cold, exploitative, and unlovable. No wonder he likes to listen to the singer who knew him as he used to be; a singer who knew him when he was on his own field, before he moved to New York, or London, or Sydney, and blended in with the mass of humanity. By way of comparison, historians tell us that Roman emperors employed Greek orators to come around and tell annually the stories of the greatest triumphs of the current Caesar and his cohorts. Without exception, the Caesars loved to listen—not because the battles were new to them, not because Caesar wasn't there, but precisely because he was. He was there then, and he is here now. Today he may appear to be a fat, pampered politician in a clean toga, but there was a time when he was there. He was a randy, sweaty, battle-seasoned soldier out there at the head of his troops, able to stand and fight with the best of them. "Listen to that Greek," Caesar would say to his court; to himself he would say, "I remember."

Just so the Anglo-Saxon. Some may say his religion is cold, formal, out of touch with God and man. What? His religion? His people produced the most fiery evangelists of the Protestant world. They produced Catholicism so fervent as to thrust into the flame first the hand that had signed a recantation. In the South, that kind of fire and ice still burns and cracks the souls of churches. Churches are still the most ubiquitous feature of any Southern county or town—churches with preachers who still thunder forth the condemnation of the evil deeds of their very hearers. Southern pulpits are not places for the espousal of sociological theory or for the denunciation of far-off wars; Southern sermons are personalized, toe-treading, meddlesome indictments of the misdeeds of the congregation at hand. Even the best-educated Southern pastors often mention sin. Little wonder that Southerners still hold at the core of their souls consciences that are still personal, not dissipated into those vaguely clucking "social consciences" that are always declaring "there ought to be a law" or that the government should do something about whatever problem arises. Much of what is Southern grows out of the kind of religion that once inspired the whole Anglo-Saxon race to battle their own kin, conquer oceans, and take their gospel and their rich heritage to heathen lands. In the South, Johnny Cash, Arthur Smith, and the Carter Sisters still sing about that kind of religion.

Or has the Anglo-Saxon heard that he doesn't know how to work? Has he heard that the once-proud WASP is now a post-capitalistic drone, lying around the board rooms of the hive while black and Spanish-surnamed bees buzz out to bring him back the honey? The South knows better. Comic strips may caricature the Southerner as a lazy, flea-bitten moonshiner whose wife must make such meager crops as can hold bodies to souls until the next welfare check arrives. Television may immortalize these caricatures with impunity while the F.C.C. and social mores forbid the slightest hint of categorizing any other ethnic group. But in truth, Southerners are a hard-working people. Laziness can't plow the same red clay that bricks are made of. Laziness can't bend a back from dark to dark again, to sucker tobacco or pull corn or even (as the stereotype goes) to pick cotton. Southerners can. They not only can, they do. They always have, and most of them plan to keep right on doing so. Even where industry has moved in, even where the city has covered the fields, the Southerner has remained a part-time farmer or at least a heavy gardener. Why? To make a little extra when the tobacco comes in, or to save a little on vegetables? Yes, that too—Southerners are too Scotch not to be thrifty. But mainly it's because he loves it. He loves exertion, the satisfaction that a man can feel when his axe bites through the last root that holds the stump in the ground where he means to plant his tomatoes. He loves the feel of the earth finally yielding to his spade. And if he doesn't especially love the weeding and the suckering and the other tedious, piddling necessities of husbandry, he at least loves the way his body and mind feel when at last he can lie down after he gets those things behind him. A feeling that cannot be entirely duplicated by athletic effort, though part of the current popularity of jogging comes from the partial satisfaction of the innate need for hard, goal-reaching exertion. The Southerner still knows how to exert productively, and the South will sing about it. Just listen to the worksongs of Merle Haggard and Merle Travis and the singing brakeman himself, Jimmie Rodgers.

Do some call the Anglo-Saxon stodgy, cautious, afraid to live life at its ragged edge? They have never seen the rambling boys of the South, and they have never heard the road songs of Hank Snow, or Don Williams, or Lester Flatt and Earl Scruggs. These fellows came out of the South. When you've grown up in Southern churches and learned—really learned—the eternal consequences of irresponsibility, you fully appreciate the danger of what you are doing when you break bad. No matter how your mouth may reject the teachings of your saintly mother, your soul still knows the lessons that you had burned into you on her lap at the old camp revivals. When you know—really know—that you are on the road to hell, you want to make sure that the trip is worthwhile, because you know that getting there is all the fun. If other Anglos have forgotten, let them listen to the South. We will sing it for them.

Perhaps most insultingly, some tell the Anglos that they are no lovers. They say the men lack the passion of Latins, the abandon of blacks. They say that the women are frigid and castrating. In the South, great love affairs are not gone with the wind. Southerners can still love; they love and hurt, love and cry, love and regret, love and remember. All that and they sing about it, too. Southern affairs are like Southern hell-raising: either by actual or contemplated adultery, the lovers are risking perdition. You don't take that kind of risk without strong feeling, but if you do find yourself in that kind of fix, you make it worthwhile. You don't dare the devil over something shallow or cold or small. If you have forgotten that, then just listen to the Southerners sing. Listen to men like George Jones, Don Gibson, and the incomparable Hank Williams; or listen to women like Kitty Wells, Loretta Lynn, and Tammy Wynette.

Most falsely of all, some say the Anglo-Saxon lacks roots. They claim an African can feel the dark, rich soil of his homeland in the marrow of his bones. They say that Latins and Poles can feel their ancestry pulsing in their veins, but that an Anglo's family tree only hangs on the wall or guarantees membership in the D.A.R. The South knows better. That's the other part of the Southerners' love of work. The Southerner loves to work the land; therefore he loves the land; therefore he stays close to it. He keeps it and himself in the family. Southerners have seen, often lived on, the land where their grandparents grew up. We know them; we remember our ancestors. Just let us sing about it. Let Eddie Arnold sing about the land. Let Doc Watson sing about his family. Hear Roy Acuff tell about his mountain home.

So, you may say, this is indeed the charm of country music. It cries out to the Anglo-Saxon about his half-forgotten memories. How then are we to explain Charley Pride, the black pride of country music? And what of Ray Charles and his success with Don Gibson and Hank Williams songs? Or what of Johnny Rodriguez and Freddy Fender, or John Denver and Fred Rose? Again, I say, it is shared recollection. Even conceding that Rodriguez and Fender are part of a separate question (that is, how "'n Western" became an appendage of country music, which, like how "'n roll" was amputated from "rock," is a topic for another essay on another day), the general answer remains the same. The South remembers and sings about its memories. The world listens.

After all, nobody ever said that blacks lack soul, or Latins passion, or Jews a sense of time. And if they can feed the hungers of their spirits on the yield of Nashville's soil, then surely this commerce can only enrich the common humanity of them all. But still, the main appeal of the music of the South, like the main support of any social good, is found among those who benefit most from it. In this case, they are the long-historied, little-loved descendants of the people who built half the civilized world—the Anglo-Saxons.

To others, the South is important; to the Anglo-Saxon, I say again, the South is essential. Nashville grows the only proper food for their spirits (with literary apologies to Austin, Memphis, Bakersfield, and all the other geographic locations that also turn out good varieties of the same or related victuals). Just as the Greek glory could not have endured nearly so long without blind Homer to sing its greatness, just as the Roman emperors could not have maintained half so long a bridge between republic and decay without their aforementioned orators, so shall not the culture that Britain built live long without its gritty bards to remind it of the quality of individuals who did, do, and shall comprise it, and maintain it and pass it along.

Even when the progeny of the British Empire has endured its last, whether after Churchill's thousand years or less, it still shall be essential that the South and its music shall have been. One of the rare great moments of television occurred in the outstanding British program, "The Six Wives of Henry the Eighth." Catherine of Aragon's spiritual advisor observed that the queen's adherence to the Catholic faith, whether successful or not, had been essential, even if it should bring down her life and her society. He declared that she was like a captain of a ship who turns it into the waves, rather than run before the storm and be destroyed without a trace. Either way, the ship and its people will be lost; but with the courage of the captain, those who later find the bits of spar and mast and keel will know that there were people there.

When future generations shall find among the ruins of an English past the bits and pieces of the music of the South, they will know that there were people here—people to say, "Oh you of future generations, we who did what we did, have shown that you can do what you do design, because we yet sing of our common humanity."

Some may say that the success of country music springs from its appeal to people of the South and elsewhere who lack the taste and training to respond to finer music; others, who take the time to consider the quality of the genre, have become instead apologists for the art. Indeed, some serious students of poetry have attributed the success of country music to the accomplished poetry of such lyricists as Kris Kristofferson and the immortal Hank Williams. Serious music critics have pointed to the instrumental virtuosity of Roy Clark and Earl Scruggs, the vocal perfection of Jim Reeves and Tennessee Ernie Ford, or the general musicological excellence of Eddie Arnold and the unique Willie Nelson. But we totally unserious good ole boys know better. We know that country music is not only popular but irreplaceable—simply because, in a thousand John's Places through and beyond the South, a Joe Allen can write, a George Hamilton can sing, and a million good ole boys can listen and remember.

Federation of Women Lawyers' Judicial Screening Panel
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RECEIVED APR 27 1987

April 27, 1987

The Honorable Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing on behalf of the Federation of Women Lawyers' Judicial Screening Panel (FWL) to urge the Committee on the Judiciary to block the confirmation of Judge David Sentelle to the United States Court of Appeals for the District of Columbia Circuit. We believe that Judge Sentelle's membership in the Masons, a society whose membership policies discriminate on the basis of sex (and probably on the basis of race as well) disqualifies him from judicial office. Until he resigns from the two Masonic lodges to which he belongs, he certainly should not be elevated to the Circuit Court.

Since its inception in 1979, FWL has articulated the position, now universally accepted, that "demonstrated commitment to equal justice" is an essential criterion of fitness for the federal judiciary. In this connection, we have repeatedly urged this Committee and other relevant bodies to recognize that a judge's membership in a club which discriminates on the basis of sex, race, or religion evidences a lack of sensitivity to the rights of the excluded group(s) which ill befits one holding judicial office.

The American Bar Association has explicitly endorsed this view in the Commentary to Canon 2 of the Code of Judicial Conduct:

> It is inappropriate for a judge to hold membership in any organization

> that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired.

While a consensus has developed that the Senate Judiciary Committee should inquire into a nominee's membership in exclusive clubs and org anizations, there appears to be a tacit assumption that groups which discriminate merely on the basis of gender are prima facie more benign and less invidious than those which have racially exclusive policies. I would like to put that assumption to rest.

In June of 1979, a written statement on this subject was submitted to this Committee by Barbara Allen Babcock and Herma Hill Kay, both noted professors of law and women's rights advocates:

> Private clubs which exclude persons from membership on the basis of race are offensive because their policies recall a period in our history when blacks were sold as property and were not accorded the rights of human beings. The existence of such clubs today is evidence that there are still many who think that minorities are not fit persons with whom to associate. The exclusion of women from private clubs delivers a different but no less offensive message. It, too, is a reminder that the legal, political, and economic role assigned to women throughout most of our history was a quite restricted one.
>
> * * * * * *
>
> There is very little that we can know about the basic attitudes of the people we appoint to the prestigious, powerful, symbol-laden, visible, life-time positions of Federal judge. The FBI and ABA investigations tell us only that the candidate is not a habitual lawbreaker or incompetent. It is impossible to assess, for most nominees, the basic ingredients of judicial performance: how their opinions will be informed, how they will deal with the litigants and lawyers before them, or what their values may be. The Senate must look to the few outward indications of these inward attitudes and values. Surely one chief indicator is the formal associations that people choose to maintain. Membership in a club that excludes

> people on the basis of sex should now be viewed with as much suspicion and subjected to as searching an inquiry as the Senate typically focuses on nominees' membership in racially exclusive clubs.

These words ring equally true today, and are a poignant reminder that with regard to many subtle but nonetheless meaningful vestiges of discrimination, women have not "come a long way."

The exclusion of women from many private clubs and associations is not merely a social inconvenience. These organizations are important sources of business and professional contacts and often provide the setting for serious business to be conducted. "It is an accepted cliche of executive life," reported the New York City Commission on Human Rights, "that more is accomplished in club bars and dining rooms than in the office. This cliche applies to the informal or even chance meeting." Thus, membership policies which discriminate against women put them at a significant disadvantage in their pursuit of economic, political, and professional opportunity. A federal judge's membership in such an organization conveys the message that he endorses, or at least accepts, discrimination on the basis of gender.

Whatever Judge Sentelle's personal feelings about the appropriate stature of women in society, his flat refusal to resign from the Masons during his confirmation hearing on April 1, 1987, provides ample evidence of his utter insensitivity to the public's perception of his fairness, freedom from bias and commitment to equal justice. Mindful of the importance of this public perception, the Senate Judiciary Committee should require his resignation as a condition precedent to his confirmation to the United States Court of Appeals for the District of Columbia Circuit.

Very truly yours,

Estelle H. Rogers

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RESOLUTION

D.C. FEDERAL JUDICIAL COURT APPOINTMENTS IN WASHINGTON, D.C.

WHEREAS, the judges of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit should represent a cross-section of the practicing attorneys in the Washington Metropolitan Area as is the case in United States District Courts and United States Courts of Appeals throughout this country, and

WHEAREAS, the President of the United States has appointed very few practicing attorneys from the Washington, D.C. Metropolitan Area as judges of the Federal courts in the District of Columbia, now therefore

BE IT RESOLVED that the District of Columbia Chapter of the Federal Bar Association strongly encourages the President of the United States to appoint judges of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia who are members of the bar practicing in the Washington Metropolitan Area and who are thus representative of the legal community over which they will preside, and

BE IT FURTHER RESOLVED that the President of the D.C. Chapter of the Federal Bar Association shall communicate this resolution to the President and the Attorney General and to other appropriate public officials of the United States.

February 11, 1987

Senator LEAHY. That will conclude the witnesses with Judge Sentelle. Judge, you and your family are welcome to stay, but you are also welcome on what is still a gorgeous day, although a little bit cool, to leave, too, if you want. It is completely your call.

Judge SENTELLE. Senator, my family has a desire to go shopping and, while I would rather they stay here, it might be safer for me later to forget it.

Senator LEAHY. Judge, yesterday was my birthday and as a surprise to me, my mother came in from Vermont, which I thought was wonderful. I have mixed emotions about it, because this morning she and my wife took off shopping. So if it is any consolation, I know exactly what you are going through at the moment. Yes, you are probably right, you should let them go shopping.

Judge SENTELLE. Thank you.

Senator LEAHY. Mr. Doty, could you join us back at the table.

Do you swear that the testimony you will give to this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DOTY. I do.

TESTIMONY OF DAVID S. DOTY, A NOMINEE, TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF MINNESOTA

Senator LEAHY. Mr. Doty, you have members of your family here.

Mr. DOTY. I do.

Senator LEAHY. Could you introduce them?

Mr. DOTY. I have my wife, Mary, and my sons, John and Robert.

Senator LEAHY. John, Robert, it is good to see you here. We are glad all three of you could be here and I am sure also it must be a very proud day for the three of you.

Mr. DOTY. I also have two of my partners here from the Washington office.

Senator LEAHY. Introduce them, too.

Mr. DOTY. Jim Welsh and Mr. Robert DeVoss, a little plug for the office that I am leaving.

Senator LEAHY. It is good to see you both here. Thank you for being here.

Mr. DOTY. Thank you, Mr. Chairman.

Senator LEAHY. Mr. Doty, some of the members of this Committee have looked at the whole question of merit selection. Of course, merit selection means different things to different Senators and different States, but I understand that you have been actively involved in the merit selection process in Minnesota, is that correct?

Mr. DOTY. That is true, Mr. Chairman.

Senator LEAHY. Can you tell us how the system works there and what kind of a role you played in it?

Mr. DOTY. Mr. Chairman, under Governor Quie, whom I think some of the Members of the Senate probably remember as a Congressman, the State of Minnesota did have a merit selection process in which the bar association got very active. What happened was that a committee was appointed by the Governor and he appointed certain members of the committee and the bar association appointed certain members, certain members came from other groups, and with that committee, the committee then interviewed great numbers of people after advertising and making it known that openings were available. After interviewing these people and having set up a standard upon which to judge them, names were submitted to the Governor, usually five names were submitted to the Governor, from which he would—he did not have to, but usually did pick one of those names.

Senator LEAHY. If a Senator was going to set up a merit screening board, what are the most important elements, in your mind, that he should look to?

Mr. DOTY. Well, Mr. Chairman, I think the case we are presently dealing with, Senator Durenberger and Senator Boschwitz did have what might be called a merit selection screening board in that they had an informal group of people who knew people around the State who might be qualified to be a Federal District Court judge.

I think those people should have a broad range of interests, a broad range of acquaintanceship with those who are qualified to become a judge and try to be representative of the various elements in society that are going to be judged eventually by that judge.

Senator LEAHY. Let me take a look at your own case, because it has been a rather protracted process, as I am sure you are more aware than anybody else. You have been nominated to fill the vacancy created by the retirement of Judge Miles Lord, is that correct?

Mr. DOTY. That is correct, Mr. Chairman.

Senator LEAHY. And did he announce his retirement in the spring 1985, about two years ago?

Mr. DOTY. Yes.

Senator LEAHY. And his resignation took effect on July 1, 1985, is that correct?

Mr. DOTY. That is correct, Mr. Chairman.

Senator LEAHY. Now, you were originally interviewed by the Justice Department in the fall of 1985, is that correct?

Mr. DOTY. That is correct.

Senator LEAHY. Then they brought you back again in the spring 1986 for some more interviews, is that correct?

Mr. DOTY. Yes.

Senator LEAHY. And when did the FBI background investigation start.

Mr. DOTY. That started in June 1986, Mr. Chairman.

Senator LEAHY. And then the President actually nominated you in February of this year?

Mr. DOTY. That is correct also.

Senator LEAHY. So the nomination has been there for over 20 months and you were officially nominated just a couple of months ago?

Mr. DOTY. That is true also.

Senator LEAHY. Now, it has been reported that a committee within the Justice Department considered in January 1986 whether you should be nominated, and the decision at first was negative. Were you aware at that time, in January 1986, of such a decision?

Mr. DOTY. No, Mr. Chairman, I was not.

Senator LEAHY. Did you become aware of it later on?

Mr. DOTY. Mr. Chairman, I have never officially known that there was any kind of controversy or negative reaction. Obviously, I have read some of the news reports and I have no idea whether they are true or not.

Senator LEAHY. Did you ever get any explanation, either from the White House or from the Justice Department, about the delay?

Mr. DOTY. Yes, I did, Mr. Chairman, and the explanation was that there was an attempt to look into the background of the nominee, that there was an attempt to make sure that the nominee was appropriately qualified and, frankly, that satisfied me, Mr. Chairman.

Senator LEAHY. Now, you were involved in a very complex class action discrimination suit. Since then, you were sued and I guess every other lawyer that came near the court house during that time was also sued. Is that correct.

Mr. DOTY. That is just about correct, Mr. Chairman.

Senator LEAHY. I recall those from my days as being a prosecuting attorney.

Mr. DOTY. Well, the suit seems to get closer and closer to home with lawyers now, lawyers are now becoming the favorite target.

Senator LEAHY. That suit has been generally considered as a nuisance suit?

Mr. DOTY. Well, it is taken seriously by those of us who are sued, as any party defendant might. However, my counsel has made a motion for summary judgment, summary disposition, which is going to be heard the end of this month, and he informs me that he believes that he has a very good chance of having that summary disposed of.

Senator LEAHY. The only thing I found good about such nuisance suits, again as a prosecutor, was that some of my family and friends were always impressed by the number of millions of dollars that would be listed on them. I could always count, every time I convicted somebody, if they went to jail for more than a year, they started going in the million dollar range. The highest I think I ever got was somebody who was going to bring a lawsuit for something around $285 million. I do not know why they hit that particular amount, but it certainly went beyond my net worth, considerably.

Now, one case you were in has become an issue, *Metropolitan Transit* v. *AM General*. As I understand it, the case concerns some allegedly defective buses which had been purchased by the Transit Commission from the defendant. The District Court ruled that some of the Transit Commission claims were barred by the statute of limitations. Around the time of that ruling, a settlement of the case was concluded. What was your role in the timing of the initiation of this lawsuit?

Mr. DOTY. Mr. Chairman, we had been counsel for the Metropolitan Transit Commission since 1967, up through 1975. At that time, there was a shift in general counsel to the Commission until 1980, and by the recitation of the facts that you have, I am sure it is clear to the Committee that the buses were purchased in 1976, actually arrived on the Commission's premises in 1976, and by 1980 they were showing signs of breaking apart and so forth.

We attempted at that time to do a legal audit for the Commission when we came aboard and provided to them some information which we thought they ought to consider in this particular problem. We finally got their attention, and by July 1980, they did consider that problem and we sued it out in October of 1980. It was a very complicated suit, involving 328 buses and various "fixes" and so forth on those buses. We took a lot of depositions, a lot of discovery was done, and then we did settle the case prior to the judge ruling on the statute of limitations.

By the way, he did not completely destroy our cause of action. He left one of the causes of action present and, frankly, we believe that even though we had not settled the case for about the amount we were suing for, we could have gone on and gotten a verdict in favor of the Transit Commission.

Senator LEAHY. You are completely satisfied with the handling of the case?

Mr. DOTY. Yes, sir, because I handled it, I am completely satisfied with it, that is true, Mr. Chairman.

Senator LEAHY. So if you have ever had any second thoughts, now is the time.

Mr. DOTY. I have never had a second thought about that one, Mr. Chairman, although obviously, you being a lawyer, there are always those in the background you might have had second thoughts about.

Senator LEAHY. The last question involves a column you wrote when you were President of the Minnesota State Bar Association. It is entitled "Independence: A Professional Necessity," and in it you wrote:

> Our form of government depends on independent lawyers and an independent judiciary. The pressures of political and moral absolutism are therefore especially threatening to the judiciary. A political body that adopts the idea that a single issue can serve as a criterion for the selection of judges is in direct conflict with the most important tenet of our judicial system, that judges must be independent.

I tend to agree with that. What do you think would be the consequences for our judicial system and our constitutional system if we ignored that tenet?

Mr. DOTY. Well, Mr. Chairman, I think that maybe it speaks for itself, but I think our system would be in dire trouble if we did ignore that tenet.

Senator LEAHY. Thank you.

Senator Thurmond?

Senator THURMOND. Mr. Doty, there is no use in taking a lot of time. In looking at your record, you appear to be well qualified to serve. What is your age now?

Mr. DOTY. About 57, Senator.

Senator THURMOND. 57.

Mr. DOTY. Correct.

Senator THURMOND. You are just a young man.

Mr. DOTY. I hope so. [Laughter.]

Senator THURMOND. I just want to ask this one question. I am interested in judicial activism. I have heard about judges taking over schools, taking over hospitals, taking over prisons and other State institutions. It seems to me the Constitution is clear that Congress makes the law, the Executive Branch headed by the President executes the law and the Judicial System headed by the Supreme Court interprets the law.

It appears to me that so many judges have gone beyond their scope. I do not know if they want more power. They have got enough power and responsibility already to do their regular job. How do you feel about that?

Mr. **Doty**. Well, Senator Thurmond, I feel very strongly about the fact that judges ought not to go beyond the power that is granted them by the Constitution initially and the statutory precepts that they must follow. I feel very strongly that the separation of powers is a very strong doctrine in our constitutional system. And related to the last question that the Chairman asked me, I feel just as strongly that a judge ought to stick to the point of interpreting the law, rather than attempting to make law.

Senator **Thurmond**. I do not have any other questions. I am familiar with the record here and I am satisfied with it. I congratulate you on being appointed by President Reagan and I hope you have a happy tenure on the bench.

Mr. **Doty**. Thank you, Senator.

Senator **Leahy**. Thank you very much, Mr. Doty. I have no further questions. I may have a couple others to submit for the record and, of course, the record will be kept open for anyone to do that.

Mr. **Doty**. Thank you.

Senator **Leahy**. Thank you very much. Also, if you want to take advantage of this fine day, please feel free.

Mr. **Doty**. Thank you, Mr. Chairman.

Senator **Leahy**. Thank you.

[Response to question follows:]

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OF COUNSEL
FRED L. MORRISON

April 6, 1987

The Honorable Patrick J. Leahy
Committee on Judiciary
United States Senate
Room 226
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

In answering your follow-up question presented to me after the hearing on April 1, 1987, I respectfully make the following response:

QUESTION: Most of your practice has been in the field of civil litigation. While the docket of the District Court in Minnesota is predominantly civil it also has criminal cases. How do you plan to prepare yourself to handle the criminal side of the docket.

RESPONSE: Although most of my career has been spent in handling of civil matters, I have had substantial experience as a prosecutor for various municipalities which our firm has represented. In addition to that experience, and in anticipation of my appointment, I undertook a course of study to prepare myself for handling criminal matters. I initially conferred with the sitting federal judges to determine what would be most helpful and was greatly assisted by them. Further, I have sat in the court room while various federal judges have performed the different tasks involved in handling a criminal matter. I then had the opportunity to confer with the judge, the magistrate and the law clerk to determine what issues were covered and emphasized. Further, I have attended Continuing Legal Education courses on criminal law to both gain substantive knowledge and learn the language and meet the practitioners. Further, I have made a concentrated study of the federal rules of criminal procedure inasmuch as they were unfamiliar to me. And finally, I have reviewed and studied the excellent material received from the Federal Judicial Center including the Manual on Recurring Problems in Criminal Trials, The Sentencing Options of Federal District Judges, The Bench Book for the United States District Court Judges and various bench comments.

I hope that this answer is appropriate; if not, I would be pleased to elaborate.

I appreciate this opportunity to further communicate with the committee as well as having had the opportunity to appear before it.

Thank you.

Sincerely,

David S. Doty

DSD/dlb/2943j

ACKNOWLEDGEMENT

DAVID S. DOTY, having been duly sworn, states and attests that the answer contained in the appended letter is true and correct.

David S. Doty

Subscribed and sworn to
before me this 6th day
of April, 1987.

Kristi K. Downey
Notary Public

KRISTI K. DOWNEY
NOTARY PUBLIC — MINNESOTA
[illegible] COUNTY
My Commission Expires Jan. 28, 1992

2943j

Senator **Leahy**. The next nominee is Richard Daronco, a nominee to be U.S. District Judge for the Southern District of New York.

Judge Daronco, would you please raise your right hand.

Do you swear that the testimony that you give in this proceeding shall be the truth, the whole truth and nothing but the truth, so help you God?

Judge **Daronco**. I do.

TESTIMONY OF HON. RICHARD J. DARONCO, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

Senator **Leahy**. All right, Mr. Daronco——

Senator **Thurmond**. Mr. Chairman, I must leave for about 10 minutes to attend another committee meeting.

Senator **Leahy**. I am not sure I can handle this all by myself.

Senator **Thurmond**. Oh, you are a very capable man. [Laughter.] I have looked over his record and I am satisfied with it and I will be glad to support him, so you just go ahead with your questions and I will come back in ten or fifteen minutes.

Senator **Leahy**. Thank you. Do you have somewhere where I can find you in a hurry if I get in over my head here?

Senator **Thurmond**. Yes. I will be in S-562.

Senator **Leahy**. All right.

Senator **Thurmond**. But you never get in over your head. [Laughter.]

Senator **Leahy**. Thank you.

Judge, you also have members of your family here?

Judge **Daronco**. Yes, I do.

Senator **Leahy**. Would you please introduce them to us?

Judge **Daronco**. I would like to introduce my mother, who is seated in the second row, one of our five children who practices law here in the area, Peter, and his friend, David Glickman, who is on the staff of Senator Lautenberg of New Jersey, and my wife, Joan. She is seated in the back of the room because she has a cold and occasionally she has to walk out.

Senator **Leahy**. I know of that, especially this time of year. I welcome all of you here and I am delighted to see you here. I commented earlier how pleased I was when my mother came down to a surprise birthday party for me yesterday, and I know how you must feel having your mother here, too.

Let me go to a couple of questions, Judge. You served on three State courts in New York, the Family Court, the County Court, and the Supreme Court. Now, you were asked to describe in your background material the most important or significant opinions you have written. All of those or nearly all of them come from the Supreme Court.

Now, I do not want to minimize the importance of these cases because any case that goes to court is important to the parties involved, but they do not appear to present legal issues of very great significance. Do you think that these written opinions accurately portray the complexity and the significance of the cases you have handled as a judge of the New York Supreme Court?

Judge **Daronco**. I believe they do. In addition to the written decisions that I have rendered, I presided at several trials that received a great deal of notoriety, murder cases and other litigation, and the one decision that I wrote at the present time would be considered a hallmark case in the area of equitable distribution in New York State.

Senator **Leahy**. Would it be typical in most of the trials at which you have presided that there would not be any kind of written opinion?

Judge **Daronco**. Yes, Mr. Chairman, most of them were jury trials and ultimately, after instruction, at the conclusion of the case, by the court, the jury would render its decision.

Senator **Leahy**. The District Court that you are being nominated to is kind of an unusual one. The Southern District of New York seems to have an awful lot of complex cases such as criminal prosecutions of organized crime figures, major securities litigation, defamation cases, and so on. It is a uniquely complex docket. Do you feel that the experience you have had in the State court system has prepared you adequately for that kind of a complex docket?

Judge **Daronco**. I think my 12 years of trial experience in the civil arena primarily and almost sixteen years on the State bench do prepare me sufficiently to take on these responsibilities if I am fortunate enough to be approved by the Senate.

Senator **Leahy**. What do you think would be the biggest challenge as you move from the State bench to the Federal bench?

Judge **Daronco**. I think you mentioned that the complexity of the mix of cases that would be coming, particularly in the Southern District, before me in that court, I think it would be a new challenge and I am anxious and look forward to fully taking on that responsibility and that challenge.

Senator **Leahy**. We have talked to a number of people about you and they have spoken very highly of your skills as a court administrator. You served as the deputy chief administrative judge for courts outside New York City, and as supervising judge for criminal cases in the Ninth Judicial District. Tell us a little bit about how those duties were carried out and how that might apply to your work in the Federal courts.

Judge **Daronco**. Until last year, the State courts in New York State had a master calendar system. We have since come over to the individual assignment system calendar, very much fashioned after the Federal system, and I have helped to administrate in that area and I think that will be good background to assist me in administering my calendar in the Federal system because we presently have a very similar approach to the disposition of cases in the State system.

Senator **Leahy**. Justice Scalia, both in his discussions here before this Committee and in other areas, has spoken very forcefully about caseload problems afflicting the Federal courts. He said he wanted to be a judge, not a case processor. How does a judge cope with all of this, without sacrificing the quality of justice? How do you, on the one hand, keep moving everything through the courts, keep those dockets clear and on the other hand still dispense justice?

Judge **Daronco**. It is a difficult task, Mr. Chairman, and I think that one has to walk a fine line and not to press settlement discussion beyond what is necessary, but nevertheless each case must have very serious settlement discussion, because if you do not either have some plea bargaining or settlement discussion, you are never able to cope with the calendar.

By the same token, each litigant is entitled to a full trial if settlement is impossible.

Senator **Leahy**. You have tried a lot of cases yourself. You have also taught trial techniques at law schools in the New York area. What makes a good trial lawyer?

Judge **Daronco**. A good trial lawyer, well, one who can articulate his client's position, as a good advocate, and at the same time anticipate very clearly what his adversary may come up with. But I do remember early on, as I began to practice law, my then senior partner told me that the trial of a lawsuit is 90 percent preparation and 10 percent inspiration, and I agree with that. I think that is the essence of trial work, and then having enthusiasm. A little bit of ego sometimes help a trial advocate, too.

Senator **Leahy**. You see, that would leave out every Member of the Senate, because none of us have the least bit of ego. [Laughter.]

If you are going to have a trial, does the judge become an important part of that mix?

Judge **Daronco**. Oh, absolutely, except the judge must make a transition from being an advocate to becoming judgmental and be able to listen to both sides and hopefully strike a happy medium or at least be receptive to the arguments, be patient, be receptive to the arguments of both sides.

Senator **Leahy**. Thank you.

Senator Thurmond said he had to leave. We will keep the record open for any other questions. Judge, thank you very, very much for being here and we thank the members of your family for coming here.

Judge **Daronco**. Thank you very much.

Senator **Leahy**. Mrs. Daronco, I hope your cold will get better.

Judge **Daronco**. Thank you.

Senator **Leahy**. Ms. Raggi, you are next. Will you please raise your right hand.

Do you swear that the testimony you give in this matter shall be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **Raggi**. I do.

TESTIMONY OF REENA RAGGI, A NOMINEE TO BE A U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Senator **Leahy**. You also have members of your family here?

Ms. **Raggi**. Yes, I have my husband, David Denton, my mother and father, Mr. and Mrs. Edward Raggi, and a close colleague of mine from my college days, Susan Irving.

Senator **Leahy**. We welcome all of you here. This must be also a proud time for the four of you, too. We are delighted that you can be here.

Ms. Raggi, you have to be one of the youngest nominees for the Federal court. If that ever creates a concern for you, let me tell you a short story. I was just reminded of it today when I walked in and saw the picture of Senator Eastland on the wall out here.

When I came to the United States Senate, I was 34 years old. That was thirteen years ago. I had just completed almost nine years as a prosecutor. I walked into Senator Eastland's office, making the normal courtesy calls. Senator Eastland was sitting behind his desk, puffing on a large Havana cigar. He was a very ardent, patriotic American, and always felt, I think, when he was smoking Cuban cigars, that he was burning Castro's crops and helping out the country that way.

He looked at me through his wreath of smoke and he said, "Boy," he said, "how old are you?" I did not think it was too appropriate or senatorial to say thirty-four-and-a-half, and I said, "Well, I will be 35 next year, Mr. Chairman." He said, "Boy, did anybody ever tell you you are too young to be in the United States Senate?"

At that point I just wanted to go back to being a prosecutor, where when people gave me a rough time I could just lock them up. [Laughter.]

But, with my knees shaking, I admitted, "Yes, that is so." He looked me in the eye and he said, "You know, when I first came to the United States Senate from Mississippi, I was 35. A lot of people there told me I was too young." He said, "Since then, I have buried them all, so pay them no mind." [Laughter.]

So, I do think, for whatever it is worth, if anyone gives you a rough time on that, that too shall pass.

Now, you have had a great deal of experience as a prosecutor, both at the trial and appellate level. In fact, I must say—and I completely agree with my good friend, Al D'Amato, on this—that you have an outstanding record, one that you can be very proud of. Tell me, though, about civil litigation. There you have had a lot less experience, and yet the bench that you are going on would have a great deal of civil litigation before it. How do you intend to make that transition?

Ms. Raggi. Senator, you are right, my criminal experience is much more significant than my civil experience, but my civil experience is not non-existent. It comes in two phases of my career very early on as a young associate at a law firm when I think I was actually fairly lucky to see a good mix of cases, not only the commercial litigation that was the bread and butter of the firm, but also some Title VII work, some slander and libel suits, and now as a partner in a New York firm I have been involved in a number of civil litigations this time as the supervising partner, 1983 suits, suits involving challenges to voting rights statutes—to voting statutes, rather, and also some securities and antitrust work.

I think that, to answer the question about how I intend to make the transition, the simple answer is to work hard. I have spoken about this with some of the senior judges in the Eastern District and I think the best advice I got was that in civil litigation, the biggest mistake that a judge can make is go into a case thinking he knows what the case is about, and that the better approach to take, one which I would hope to take, is to look on the matter as something that one knows very little about, something that the lawyers will now teach you about, something that you will set your staff to work teaching you about, and ultimately something that you will roll up your own sleeves and learn about, and in the course of doing all of that, learn enough about the discreet facts that are before you to try and render some just and fair decision to the parties who are before you. That is basically how I would hope to deal with subjects that are different from the criminal practice that I have done for so long.

I think that the trial work—and I have seen civil trials, both as a practitioner and as someone who basically lived in the Eastern District courthouse during my years as a prosecutor—I do not think the trial work will be significantly different. The rules of evidence are the same, the Rules of Civil Procedure certainly can be learned, to the extent I do not already know them.

Senator LEAHY. Your nomination has been very broadly endorsed. In fact, I was impressed by the number in the defense bar who support it. I figured it was one of two things: Either they felt you would be a superb judge or they were tired of having you beat them and they wanted to get you out of there.

You have to ask yourself the same kind of question I did. A while before I came to the Senate, I was approached as to whether I would be interested in a judgeship back home, and I declined. But one of the questions I had to ask myself is this. I had been a very avid prosecutor, and you sort of get a feeling as a prosecutor that the State is your client, the people are your client. Do you have any feelings that you are going to have any difficulty putting that aside, because you will also have in all likelihood some criminal cases on the bench?

Ms. RAGGI. Oh, yes. I have to say that I was very proud of the time I spent as a prosecutor. I saw it as public service and I saw it as something where the public was entitled to vigorous, creative advocacy as much as any other client. But I do not think I ever saw it as other than being a partisan advocate, someone whose responsibility in dealing with the various criminal statutes was to argue that the government was empowered to take the RICO statute or the mail fraud statute or the Bail Reform Act to the step that we were now all pushing it.

I think the defense bar's obligation was to pull the law in the other direction. In doing that, there was always something in me that thought there would be tremendous appeal not to have to stretch but, rather, to call it down the middle, which is what I really see the judicial function as being.

So though I was a vigorous advocate, because I thought that was what that job required, I do not think I ever saw that as being the only side of doing the right thing, by any means. I think you are an advocate or a partisan as prosecutor, and since I always saw that difference I do not think I would have a serious problem making the transition to the middle, to the judicial role.

Senator LEAHY. The prosecutor, is an advocate, but also is responsible to be protective of the application of the law, including the application of law toward the defendant.

Ms. RAGGI. Yes, and I think that that is where the prosecutor is different from any other lawyer with a client, because the duty is not simply to strike hard blows but fair ones, as the Supreme Court has told us. So I understand that and also have spent a great deal of my time declining prosecutions as well as arguing for conviction. Nevertheless, I think that prosecutors are partisan in their presentation of certain statutes and their scope to the courts, but I do not think the court should have to play that role.

Senator LEAHY. You graduated with honors from Harvard Law School in 1976, eleven years ago, and then you were admitted to the bar, though, a year later. Why the delay in the——

Ms. RAGGI. In New York at that time, although you could take the bar exam, as I did in the summer, right after graduation, you did not hear your results until approximately the holidays, and then you were put on a calendar for appearances before the Ethics Committee in New York, which had personal interviews with every candidate. My schedule was, I believe, for an appearance in March of the following year. I was admitted as soon as I could be, but that was the schedule at that time in New York. I think it has been speeded up somewhat, but not much.

Senator LEAHY. You have a short resume. This is a terrible term to use, but yours is. The Senate has confirmed nominees with a short resume. But we have not done so very often. What do you think distinguishes your experience from that of other lawyers who have had such a short period of time in the bar?

Ms. RAGGI. I think probably the fact that the bulk of the time has been spent in the very Federal court to which I am being nominated. I spent the better part of my career in the Eastern District of New York. I think I know the court. I think I know the problems it faces. I certainly know the kind of criminal calendar that the court has. And I think the fact that I have done so much trial work, so much litigation in that court perhaps multiplies those years of experience in a way that you could not if I had spent all of them in a Wall Street law firm, for instance.

Senator LEAHY. I talked with the Chairman of the American Bar Association's Standing Committee on the Federal Judiciary. In fact, I invited him over to my office and had a long talk with him. We went over a number of cases, but yours particularly. The ABA rated you qualified for the Federal bench; a small minority of the committee said you were unqualified. Do you have any idea in your own mind why that minority held that view?

Ms. RAGGI. I do not know officially, because all I received was the copy of the letter sent to the committee saying what you just said, Mr. Chairman, that the majority found me qualified, a small minority found me not qualified. I have always assumed that it was because the ABA has a rule or recommendation that candidates have twelve years experience, and I am out of law school eleven years. I was interviewed by Robert McCrate, who at that time was the Second Circuit representative for the ABA. He told me that although that was a matter of increasing concern in the ABA, that he was going to recommend to his colleagues that they not strictly apply the rule in my case. I have always assumed that he was not persuasive across the board with his colleagues.

Senator LEAHY. Well, of course, the Senate is going to make its own independent determination. I have on a number of occasions over the past thirteen years expressed my disagreement with the

ABA and their particular findings on individual cases. I get concerned that they might get a little bit too rigid.

And as you spent nearly all of your eleven years since graduation in a very active trial practice, that is very valuable experience. You have had more trial practice than a number of other nominees. We have had people who have been at the bar a lot longer than you have but I put a great deal of emphasis on trial practice. I think it is very important. I think that everybody, whether they are going to an appellate position or a trial court position, should have a fair amount of practice because I think that is where the realities of the court system hit you the most.

You have also had a lot of experience in issues such as new technology in law enforcement and international law enforcement cooperation. These are not insignificant or uncomplicated areas and I think they stand you in good stead.

Let me just put this last question. What would you say is the most significant accomplishment of your legal career, other than being nominated to the Federal bench?

Ms. RAGGI. I think so far I would have to say that it was the three months that I served as U.S. Attorney by appointment of the court. I feel that I handled many matters that were significant, but to run an office as complex as the Eastern District was certainly the biggest challenge that I faced, and to the extent that I think that those 3 months of office ran very successfully—there were a lot of major cases that had been developed and that were on-going during that time that were successfully prosecuted—to that extent I am proudest of those three months.

Senator LEAHY. Senator Thurmond?

Senator THURMOND. Thank you very much, Mr. Chairman.

I want to congratulate you, Ms. Raggi, upon your appointment to be a Federal District judge.

Ms. RAGGI. Thank you, Senator.

Senator THURMOND. I feel you will make an excellent one.

Mr. Chairman, she is young, she is pretty, she is smart. Now, most of the candidates who come before us are not so young, not so pretty, and some of them are not altogether smart.

Senator LEAHY. But we run them through anyway. [Laughter.]

Senator THURMOND. So we want to congratulate the President on appointing you.

I had the pleasure of meeting Ms. Raggi in New York several years ago when she was, I believe, Assistant U.S. Attorney and was chief of the narcotics section. I was impressed with you then and I predicted to myself that here is a lady who will be a judge someday if she wants to be. Some people prefer not to be a judge, but with your fine qualities, abilities and character, I felt certain that you had a bright future. And I feel confident that you will make an excellent judge and I wish you well on the bench and I hope you will be happy in your new position.

Ms. RAGGI. Thank you very much, Senator.

Senator LEAHY. Ms. Raggi, let me say that had I been on the ABA committee, my vote would have been very qualified.

Ms. RAGGI. Thank you very much.

Senator LEAHY. I think you have had an extraordinary career in a very short period of time, one I find very impressive. Each one of us has to make up our own mind on your nomination. But, as one individual Senator, I put a great deal of weight on trial experience and you certainly have that. Your academic background is outstanding and is one that would be happily accepted by any judge, so I wish you the very best and I thank you very much for being here.

Ms. **Raggi**. Thank you very much, Senator.

Senator **Leahy**. And with that, we will stand in recess.

[Whereupon, at 3:22 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

[Material furnished for the record follows:]

DAVID BRYAN SENTELLE

Birth:	February 12, 1943	Canton, No. Carolina
Legal Residence:	North Carolina	
Marital Status:	Married	Jane L. Oldham Sentelle 3 children
Education:	1961 - 1965	University of North Carolina B.A. degree
	1965 - 1968	University of North Carolina School of Law J.D. degree
Bar:	1968	North Carolina
Experience:	1968 - 1970	Uzzell and DuMont Associate
	1970 - 1974	Assistant U. S. Attorney Western District of No. Carolina
	1974 - 1977	District Judge 26th Judicial District State of No. Carolina
	1977 - 1980	Bryant, Hicks and Sentelle Partner
	1980 - 1985	Tucker, Hicks, Sentelle Moon and Hodge, P.A. Partner
	1985	Sole Practitioner
	1985 - present	United States District Judge Western District of No. Carolina
Office:	U.S. Post Office & Courthouse Post and Otis Streets, Rm 241 Asheville, North Carolina 28802 704 259-0229	
Home:		

To be United States Circuit Judge for the District of Columbia Circuit

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DAVID B. SENTELLE

INFORMATION REQUESTED OF JUDICIAL NOMINEE

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: David Bryan Sentelle
2. Address:

Home: 798 Rose Hill Road
Asheville, North Carolina 28803

Office: P. O. Box 212
Asheville, North Carolina 28802

3. Date and place of birth:

Date: February 12, 1943
Place: Canton, North Carolina

4. Marital Status: (include maiden name of wife or husband's name.) List spouse's occupation, employer's name and business address(es).

Married to Jane LaRue Oldham Sentelle, presently a housewife; employed part time 1981-1983 for H & R Block Tax Preparers, Charlotte, North Carolina.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of North Carolina at Chapel Hill, North Carolina.
Dates of Attendance: Fall, 1961 through Spring, 1965
Degree: B. A. in Political Science, Spring, 1965

University of North Carolina School of Law
Dates of Attendance: Fall, 1965 through Spring, 1968
Degree: Juris Doctor with Honors, Spring, 1968

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

DATE	NAME AND ADDRESS OF EMPLOYER	CAPACITY
September, 1968 through February, 1970	Uzzell and Dumont Jackson Building Asheville, N. C. (No longer in existence)	Associate/Attorney
March, 1970 through November, 1974	United States Attorney's Office, Western District of North Carolina Room 251, Charles R. Jonas Federal Bldg., 401 W. Trade St., Charlotte, NC 28202	Assistant United States Attorney
November, 1974 through November, 1977	State of North Carolina Raleigh, North Carolina Located at Mecklenburg County Courthouse 800 E. Fourth St., Charlotte, NC 28202	District Judge 26th Judicial District
Summer, 1977	University of North Carolina, Charlotte, NC	Visiting Instructor Criminal Justice
November, 1977 through February, 1980	Bryant, Hicks and Sentelle 1750 Southern National Center, Charlotte, NC, 28202	Partner/Attorney
March, 1980 through March, 1985	Tucker, Hicks, Sentelle Moon and Hodge, P.A. Suite 400, 1130 Third St., Charlotte, NC 28204	Shareholder/ Director/Attorney

April, 1985 through November 7, 1985	Self-employed in the practice of law sharing space with Tucker, Hicks, Moon, Hodge and Cranford, P.A., Suite 400, 1130 E. Third St., Charlotte, NC, 28204, and alone at 798 Rose Hill Rd., Asheville, N.C., 28803, principally consulting with other attorneys on litigation matters while awaiting confirmation to U. S. District Judge	
November 8, 1985 through Present	United States Courts	U. S. District Judge for the Western Dist. of North Carolina, Asheville, NC

In addition, I have been a director of United Christian Prison Ministries, Charlotte, North Carolina, from 1975 through 1978; Open House Drug Counseling Service, Charlotte, North Carolina, from 1975 through 1978; and a partner in Terra Firm Properties, a North Carolina real estate partnership since 1980.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   Dameron Scholarship Winner, UNC School of Law, 1966-1968;
   Order of Coif;
   Lawyers' Cooperative Awards (Book Awards) for Academic Excellence in the Law School Fields of Evidence, Equity, Personal Property, Trusts, and Pleadings;
   Lawyers' Title Award for Outstanding Real Property Student in UNC Law School Class of 1968;
   Walter Clark Award (presented to the 10 top students academically in each UNC graduating class), 1968;
   Board of Editors, N.C.L.Rev.;
   Additionally, my Juris Doctor degree was awarded with honors.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

   American Bar Association;
   North Carolina Bar Association;
   Federal Bar Association (President, Charlotte Chapter, 1975);
   Twenty-Sixth Judicial District Bar (Courts Committee, 1983-84)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational, "public interest," law, etc.)

    I do not currently belong to any organization which fits the description of Question #10.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

    Court Admissions:
    Supreme Court of North Carolina and all the Courts of North Carolina General Courts of Justice - September 12, 1968;

    United States District Court for the Western District of North Carolina - January 27, 1970;

    United States Court of Appeals for the Fourth Circuit - November 10, 1970;

    Supreme Court of the United States - September 8, 1983;

    United States District Court for the Eastern District of North Carolina - June, 1983.

    In addition, I have been admitted pro hac vice for particular litigation in the Eastern District of Pennsylvania, the District of New Hampshire, and the Southern District of Florida.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

    Landlord and Tenant-Lessee's Liability for Sublessee's Negligence, 45 NCLR 295 (December, 1966)

    Constitution Law-First Amendment Protection of the Right to Demonstrate - the "New" Limitations, 45 NCLR 724 (April, 1967)

    Essay, "Listen and Remember," Why the South Will Survive, University of Georgia Press, 1980

    "The Initial Interview," North Carolina Drunk Driving Cases Manual, Continuing Legal Education Publication, Wake Forest University School of Law (May 28, 1982)

    "Juvenile Adjudications," Comprehensive Crime Control Act of 1984, Continuing Legal Education Publication, Campbell University School of Law (May 24, 1985)

    "Insanity," Comprehensive Crime Control Act of 1984, Continuing Legal Education Publication, Campbell University School of Law (May 24, 1985)

13. Health: What is the present state of your health? List the date of your last physical examination.

State of Health: Excellent.
Date of last physical examination: September 8, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

North Carolina District Judge, 26th Judicial District - November, 1974 through November, 1977 - Appointed to fill an unexpired term and was elected at the end of that term. I resigned mid-term 2977. Jurisdiction: Misdemeanor trials; felony pre-trial hearings; civil matters, jury and nonjury trials in which the relief sought did not exceed $10,000 in controversy or unlimited by stipulation of the parties; and all domestic and juvenile jurisdiction.

United States District Court Judge for the Western District of North Carolina - November, 1985 to Present - Appointed. Jurisdiction: All Article III jurisdiction conferred on district judges by Title 28 or other Acts of Congress.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

TEN SIGNIFICANT OPINIONS:

Safeco Insurance Company of America v. Merrimack Mutual Fire Insurance Company, 789 F.2d 480, 1986.

William G. Newman, etc., et al. v. Hy-Way Heat Systems, Inc., et al., 789 F.2d 269, 1986.

John B. Gardner, et al. v. Asbestos Corp., Ltd., et al., 634 F.Supp. 609, 1986.

W. M. (Bill) Hendon, et al. and U. S. Senator Jesse Helms, et al. v. N. C. State Board of Elections, et al., 633 F.Supp. 454, 1986.

United States v. Robert Gary Mest, 789 F.2d 1069, cert. denied, 93 LE.2d 102; 107 S.Ct. 163, 1986.

Joseph M. Tarantino v. State of North Carolina, et al., 639 F.Supp. 661, 1986.

Clary v. Bowen, 637 F.Supp. 1186, 1986.

Champion International Corp. v. E.P.A., 648 F.Supp. 1390, 1986.

Griffin v. Tenneco, 55 U.S.L.W. 2356, 1986; 648 F.Supp. 964, 1986; 14 Prod. Liab. Rep. 865, 1986.

Livingston v. Int'l. Ass'n. of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, 647 F.Supp. 723 (W.D.N.C. 1986).

To date, I have not been reversed by any appellate court nor has any judgment of mine been affirmed with significant criticism of my substantive or procedural rulings.

As to significant opinions on federal or state constitutional issues, see Hendon v. N. C. State Board of Elections; United States v. Mest; and Tarantino v. State of North Carolina listed above.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Assistant United States Attorney - March, 1970 through November, 1974 - Appointed

Centralina Council of Governments, Criminal Justice Commission - 1976-77 - Appointed

Mayor's Committee on Law and Order - 1978-79 - Appointed

Candidate for Mecklenburg County Commission, 1980 - unsuccessful

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1968 through March, 1970 - Associate attorney in firm specializing in insurance defense. Practice consisted principally of investigation and pretrial preparation with occasional participation in trial of personal injury and workers' compensation cases with some other litigation, a small amount of real estate and estates practice;

March, 1970 through November, 1974 - Assistant United States Attorney conducting principally criminal, but some civil and appellate litigation on behalf of the United States and various agencies thereof;

November, 1974 through November, 1977 - Judicial office, see answer to question Number 14;

November, 1977 to March, 1985 - General litigation with specialization in criminal, particularly white collar crime areas, with particular emphasis on federal criminal litigation. At the same time, I engaged in a fair percentage of civil litigation and in a secondary sub-specialty of representing community groups in land use administrative proceedings related to special use, zoning, and similar land use questions.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical former clients:

1968 through March, 1970 - Insurance companies;

March, 1970 through November, 1974 - The United States and various agencies thereof;

November, 1974 through November, 1977 - Judicial office - The State of North Carolina and citizens thereof;

November, 1977 to November, 1985 - White collar federal and state criminal defendants; general litigation plaintiffs and defendants; community groups in land use.

Areas of specialization:

1968 through March, 1970, I was in insurance defense. After my return to private practice in 1977, I practiced general litigation law with an emphasis on criminal, particularly white collar crime and federal crime, although with a fair amount of practice in state courts relating to all classes of misdemeanors and felonies. I additionally practiced general civil litigation with some degree of specialization in domestic law. Outside of the areas of pure litigation, I developed a certain expertise and specialization in the representation of community groups and property owners in property use/zoning controversies with government entities.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

During the period September, 1968 through March, 1970 as an associate attorney in a firm specializing in insurance defense, my practice consisted principally of investigation and pretrial preparation on cases tried by more senior attorneys in the firm in the areas of personal injury and worker's compensation. I made fairly frequent appearances for motions hearing and occasionally participated in trial and did some small amount of litigation practice on personal clients, generally with traffic offenses or other minor criminal offenses. My rate of appearance at that time was less frequent than at any other time in my practice.

During the period March, 1970 through November, 1974, I served as an Assistant United States Attorney. I was in charge of the Charlotte office for the Western District of North Carolina and was the principal trial attorney there. My court appearances were almost exclusively in federal court (although occasionally representing a federal agency in State Court of Record). The balance between civil and criminal was skewed toward the criminal although I handled many civil matters for federal agencies. Court appearance was quite frequent; perhaps more frequent than at any other point in my practice.

From November, 1974 until November, 1977, I held judicial office and attended court daily as a North Carolina State District Court Judge.

For the balance of my legal career, I have appeared in court very frequently.

2. What percentage of these appearances was in:

   (a) Federal courts;
   (b) State courts of record;
   (c) Other courts.

3. What percentage of your litigation was:
   (a) Civil;
   (c) Criminal.

Year	Civil	Criminal	Federal	State Court of Record	Other State Court	Jury	Non-Jury	Total Cases* Tried
1968	0	3	0	0	3	0	3	3(1c)
1969	3	9	0	3	9	3	9	12(4)
1970	1	18	18	0	1	16	3	19(6)
1971	2	11	13	0	0	12	1	13(4)
1972	0	24	24	0	0	23	1	24
1973	0	23	23	0	0	18	5	23(3)
1974	0	6	6	0	0	5	1	6(1)
** 1975	0	0	0	0	0	0	0	0
** 1976	0	0	0	0	0	0	0	0
** 1977	1	0	0	1	0	1	0	1
1978	4	7	0	11	0	0	11	11
1979	8	14	3	18	1	7	15	22
1980	6	9	2	13	0	7	8	15(1)
1981	4	8	2	10	0	6	6	12(1)
1982	0	6	0	6	0	1	5	6
1983	1	15	3	13	0	4	12	16
1984	0	9	2	7	0	5	4	9
1985	0	1	1	0	0	1	0	1
T.	30	163	97	82	14	109	84	193(21)

* Numbers in parentheses indicate the number of cases in which I served as associate or co-counsel. In all other cases I was chief counsel. Again, this number represents a total actually less than the total number of cases tried.

** During years 1975, 1976 and through a portion of November, 1977 I was out of the practice of law serving as a North Carolina State District Judge.

sentence with a period of probation. The case was tried in United States District Court for the Western District of North Carolina before the Honorable Wilson Warlick, Senior United States District Court Judge. I was sole counsel for the United States, conferred with the United States Internal Revenue Service agents in the preparation of the matter, conducted the trial, examined all government witnesses and cross-examined all defense witnesses and was totally responsible for the conduct of the trial. There were no co-counsel. The defendant was represented by Joe T. Millsaps, Wachovia Center, Charlotte, North Carolina, telephone 704/377-9371 and Harold M. Edwards, Suite 900, 730 East Trade Street, Charlotte, North Carolina, telephone 704/377-9661.

2. United States vs. Arthur Tilmer Mankins. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. C-CR-73-60.

This case was a prosecution for the murder of a special agent of the Federal Bureau of Investigation engaged in the performance of his official duties pursuant to Title 18, United States Code, Section 1114. Joined for trial with the case were additional counts for assault on another Federal Bureau of Investigation agent and the use of firearms in the commission of both offenses. This case is significant to me because of the importance of protecting the integrity and the persons of the federal law enforcement system and because of my own personal feelings concerning the heinous nature of the crime. I was principal counsel and sole trial counsel for the United States in this matter. I worked in the preparation of the case directly and closely with agents of the Federal Bureau of Investigation from the day of the murder through the trial. I either supervised or conducted all pre-trial preparation. I conducted voir dire of the jury (which in this district is done by counsel rather than the court) and examined all government witnesses. The disposition of the trial came on an unbargained plea of guilty after the presentation of most of the government's evidence. The dates of the trial were July 2-10, 1973. The case was tried in United States District Court for the Western District of North Carolina before the Honorable Woodrow Wilson Jones. The defendant was represented by Robert G. McClure, Jr., now of Asheville, North Carolina, Northwestern Bank Building, Post Office Box 7345, Asheville, North Carolina, 28807, telephone 704/253-4766.

3. United States vs. Chester Ray Looney, Bobby James Scates, Larry Eugene Searcy, Robert Edward Grubb, Dean Ledbetter, Henry Gene Ledbetter, Edwin Acevedo, Jose Antonio Rosario, and German Rosario. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. C-CR-73-28.

This case involved a conspiracy among nine defendants to transport firearms illegally in interstate commerce. This involved the purchase of thousands of handguns in South Carolina, shipping them by truck to Charlotte, North Carolina, where they were transshipped to a textile truck traveling to New York City where the guns were then distributed on the streets of South Bronx section of New York City, as well as other areas. I considered this case to be of significance because of the highly dangerous nature of the crime involved and because it was at that time the largest gun-running conspiracy ever tried in this part of the country and possibly in the United States. It was a conspiracy of significant magnitude in that it was covered by national news media including "Sixty Minutes." I was sole trial counsel for the United States. I worked directly with Alcohol, Tobacco and Firearms Division agents in the investigation and preparation of the case from the early stages of the investigation. I conducted both trials as sole prosecutor responsible for the direct examination of all prosecution witnesses, cross-examined all defense witnesses, as well as conducting the arguments of all motions and final arguments. The first trial resulted in guilty verdicts of the three defendants who pleaded not guilty (after the guilty pleas from all other defendants). The second trial of the defendants Dean and Harry Ledbetter resulted in guilty verdicts as to both defendants. After the first trial, all defendants were sentenced to five years' imprisonment. Sentences varied among the defendants from probation and a fine to active sentences of varying lengths after the second trial. The sentences from the first trial were set aside by the United States Court of Appeals for the Fourth Circuit, 501 F.2d 1039 (1974), which also reversed and remanded for retrial of the case as to the defendants Ledbetter. In the first trial, all defendants pleaded guilty except the Ledbetters and Chester Looney who proceeded to trial. Looney was represented by Michael Blackford of the Charlotte Bar, now deceased. The Ledbetters proceeded *pro se*.

At the second trial, Dean Ledbetter was represented by Charles Myers of the Charlotte Bar, now deceased, and Henry Ledbetter was represented by Lila Bellar, 1901 Park Drive, Charlotte, North Carolina, telephone 704/334-9759, and Marshall Karro, 1508 East Fourth Street, Charlotte, North Carolina, telephone 704/377-1504. The dates of trial were June 17-20, 1973 and October 8-11, 1974. The case was tried in United States District Court for the Western District of North Carolina the first time before Senior District Judge Wilson Warlick, now deceased, and the second time before the Honorable Chief Judge Woodrow Wilson Jones. [Affirmed 529 F.2d 1107 (1975)].

4. United States vs. Jim Atkinson. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. CR-2639.

This was a mail fraud/wire fraud conspiracy prosecution involving the use of fraudulently obtained credit cards. The defendant was a merchant who cooperated with a ring of credit card fraud operators by writing up fictitious sales, calling these in to the Atlanta National Data Center computer for approval and splitting the proceeds with the card holder. This case was particularly significant because according to the Postal Inspection Service and several credit card investigators this was the first prosecution in the southeastern region of a cooperating merchant, although credit card fraud rings had been investigated and prosecuted previously. I was sole counsel for the government in the case. I participated in the investigation with an informal strike force consisting of Postal Inspector Edwin S. Shively, Jr., Sergeant William Austin, head of the Charlotte Police Department Fraud Squad, and credit card investigators from several major oil companies and credit card companies. This investigation included my going to Atlanta to become familiar with the computer operations - the first time this had been done by a prosecutor in this region. I was solely responsible for the trial on behalf of the United States. The trial resulted in a jury verdict of guilty on all counts. This case was tried January 19-21, 1972, in the United States District Court for the Western District of North Carolina before Senior District Court Judge Wilson Warlick. The defendant was represented by Robert G. Saunders, 900 Law Building, 730 East Trade Street, Charlotte, North Carolina, 28202, telephone 704/333-9661, and Larry Thomas Black, 725 East Trade Street, Charlotte, North Carolina, telephone 704/333-0381.

5. United States vs. Raymond Henry Starnes. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. C-CR-78-59.

This was a prosecution for mail fraud, wire fraud, securities violations and conspiracy to commit those violations. This arose out of an alleged off-shore bank scheme. The case has particular significance because it was an unusually involved fraud case and is the only case of this nature to my knowledge ever tried in the Western District of North Carolina. Several potential co-defendants pleaded guilty and testified for the prosecution. Raymond Starnes, whom I represented, pleaded not guilty. I was principal trial counsel for Starnes and conducted the entire trial. I was assisted in preparation by Richard A. Elkins, then an associate with my law firm. We tried the case to a jury along with the case of co-defendant Frank Oliver. The trial dates were January 2-12, 1979. The case was tried before the Honorable James B. McMillan, United States District Court Judge, in the United States District Court for the Western District of North Carolina. The result was a not guilty verdict as to all counts. Opposing counsel were then Assistant United States Attorney Harold J. Bender and Wayne C. Alexander. Mr. Bender now practices law at 725 East Trade Street, Charlotte, North Carolina, 28202, telephone 704/333-2169, and Mr. Alexander practices with Casey, Bishop, Alexander and Murphy, P. A., 101 North McDowell Street, Charlotte, North Carolina, 28202, telephone 704/376-7461. My associate counsel Richard A. Elkins is now a North Carolina District Judge for the 26th Judicial District with chambers in the Mecklenburg County Courthouse, 800 East Fourth Street, Charlotte, North Carolina, 28202, telephone 704/373-6735. The co-defendant, Frank Oliver, a member of the Chicago, Illinois, Bar, 431 South Dearborn Street, Chicago, Illinois, 60605, telephone 312/786-1048, represented himself.

6. United States vs. Carl A. Boggs, Jr. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. C-CR-80-109.

This was an antitrust case tried on a three-count bill of indictment alleging violations of Section 1 of the Sherman Act. It was significant, both as one of the few criminal antitrust cases ever tried in this region and because it was part of a major ongoing multi-state investigation by the Antitrust Division of the U. S. Department of Justice of alleged bid-rigging conspiracies in the southeastern region of the United States. I was sole trial counsel for the defendant although I was assisted in preparation by attorneys for his corporate employer, The Dickerson Group, Inc., which was separately indicted. I was solely responsible for the conduct of the trial on behalf of the defense. The case was tried to a jury which returned verdicts of not guilty as to two counts of the indictment and guilty as to one count on which the defendant was sentenced to sixty days active custody and a fine. The trial dates were February 25-27, 1981 in the United States District Court for the Western District of North Carolina, Statesville Division, before the Honorable Chief Judge Woodrow Wilson Jones. While I had no co-counsel as such, I worked closely in preparation with attorneys representing The Dickerson Group. That defense team was headed by Paul L. Friedman, White and Case, 1747 Pennsylvania Avenue, NW, Washington, D. C., 20006, telephone 202/872-0013. The United States was represented by Arthur A. Feiverson, United States Department of Justice, Antitrust Division, Room 3234, Washington, D. C., 20530, telephone 202/633-2476; Laura Metcoff Klaus, then of the Antitrust Division, now of Arter and Hadden, 1919 Pennsylvania Avenue, NW, Washington, D. C., 20006, telephone 202/857-0960, and Joel F. Brenner, then of the Antitrust Division, now practicing at 2141 Wyoming Avenue, NW, Washington, D. C., 20008, telephone 202/234-7491.

7. Bettye Hairston, Administratrix of the Estate of John O. Hairston vs. Alexander Tank and Equipment Company and Haygood Lincoln-Mercury, Inc., original defendants and Alexander Tank and Equipment Company, Third-Party Plaintiff vs. James Fulton Whitby and Two-Way Radio of Charlotte, Inc., Third-Party Defendants, 70-CVS-9280.

This was a wrongful death action arising out of unusual facts. The deceased had purchased a new 1978 Lincoln automobile from the defendant Haygood Lincoln-Mercury. He drove the vehicle less than four miles when one of the rear wheels came off the vehicle and rolled down an embankment at the approach to a bridge. When the deceased brought the vehicle to a stop he was on the bridge. Whitby, third-party defendant, brought a van owned by the other third-party defendant to a stop behind the Hairston vehicle and turned on his flashers. A flatbed truck operated by Alexander Tank and Equipment Company crested a hill some quarter of a mile away from the bridge, struck the van in the rear a few minutes after the original incident, and knocked the van into the rear of the Hairston vehicle, pinning the decedent between the two vehicles and resulting in his death. I, along with two of my law partners, represented the plaintiff decedent's estate. We tried the case to a jury and obtained a verdict against both defendants. The trial judge set the verdict aside with reference to defendant Haygood Lincoln-Mercury and entered a judgment notwithstanding the verdict on the theory that the negligence of Haygood Lincoln-Mercury in installing the wheel improperly was insulated by the superseding negligence and was not a proximate cause of the death. As Alexander Tank and Equipment Company did not have sufficient coverage or solvency to make the entire judgment collectible, we joined in the appeal of Alexander Tank and Equipment

Company. The North Carolina Court of Appeals, 60 N.C.App. 320; 299 S.E.2d 790 (1983), found no error and affirmed the judgment. The Supreme Court of North Carolina accepted the case on writs of certiorari and in 310 N.C. 227; 311 S.E.2d 599 (1984) unanimously reversed the Court of Appeals as to the liability of the defendant Haygood Lincoln-Mercury, Inc. and restored the jury verdict against both defendants. We consider the case particularly significant because of its establishing the continuing proximate cause between the seller of defective vehicles and parties injured by accidents resulting therefrom, even in the case where other negligence has occurred in the meantime. (We were able to establish that the wheel was installed by Haygood Lincoln-Mercury and not by the manufacturer and by expert testimony that the wheel was improperly installed.) I tried this case along with two of my law partners. My role in this case was the presentation of evidence concerning the facts of the accident and the cross-examination of all witnesses, as well as the making of closing jury arguments. My co-counsel were Fred A. Hicks and John E. Hodge, Jr., both of Tucker, Hicks, Sentelle, Moon and Hodge, P.A., Suite 400, 1130 East Third Street, Charlotte, North Carolina, 28204, telephone 704/377-9714. The trial dates were June 1-8, 1981, in the Superior Court for Mecklenburg County, North Carolina, before the Honorable Robert B. Lewis, Superior Court Judge. Counsel for the other parties were:

Alexander Tank and Equipment Co., Inc.	Fred C. Meekins Golding, Crews, Meekins, Gordon & Gray Suite 400, Attorneys Bldg. 806 E. Trade St. Charlotte, NC 28202 PH: 704/374-1600
Haygood Lincoln-Mercury, Inc.	Philip R. Hedrick and John A. Gardner, III, both of Hedrick, Eatman, Gardner Feerick and Kincheloe 215 Executive Park 831 Baxter St. Charlotte, NC 28202 PH: 704/377-1511
Both Third-Party Defendants Whitby and Two-Way Radio of Charlotte, Inc.	William E. Poe Parker, Poe, Thompson Bernstein, Gage & Preston 2600 Charlotte Plaza 201 S. College St. Charlotte, NC 28244 PH: 704/372-9000

8. State of North Carolina vs. Ben Lester Quick, 83-CRS-4848.

This was a capital murder case in which I accepted appointment to represent a young indigent man who had been arrested and indicted for the murder of a deaf mute woman over a year before the indictment. I consider this case especially significant in my practice because it was a highly publicized murder. Pretrial publicity had linked Quick with the murder from shortly after the incident up until the trial itself in such a fashion as to leave the strong impression, if not presumption, of guilt. I was chief counsel for the defense in the case. At my request, Wayne C. Alexander of the Charlotte Bar was appointed to assist me as North Carolina practice and my own strong feelings permit two appointed counsel in capital cases. I retained the lead counsel role although Alexander occupied a strong co-counsel role. We prepared and tried the case together, splitting duties of preparation and examining prospective jurors and witnesses in almost equal numbers, although I, again, took the lead role. Each of us argued to the jury, I making the principal closing argument. During the second day of jury deliberation, the jury reported themselves hopelessly deadlocked. The split was 6-6 and the case was mistried. In part, because of evidence developed by Mr. Alexander and me, the State ultimately decided it would be unable to reprosecute the case and the case was dismissed against Ben Quick. The trial dates were February 14-26, 1983, in the Superior Court for Mecklenburg County, North Carolina, before the Honorable Lacy H. Thornburg, then Superior Court Judge, now Attorney General of the State of North Carolina, Post Office Box 629, Raleigh, North Carolina, 27602, telephone 919/733-3377. My co-counsel in this case was Wayne C. Alexander of Casey, Bishop, Alexander and Murphy, P. A., 101 North McDowell Street, Charlotte, North Carolina, 28204, telephone 704/376-7461. The State of North Carolina was represented by Assistant District Attorney Phillip Howerton and Sara Pressley, District Attorney's Office, Courthouse Annex, 700 East Trade Street, Charlotte, North Carolina, 28202, telephone 704/373-6746. Mr. Howerton has since left the District Attorney's Office and may be reached at 800 Cherokee Road, Charlotte, North Carolina, 28204, telephone 704/372-8484.

9. United States vs. Mark Douglas Odom, Joyce Geraldine Beach, Benny Carol Dyson, and John Edward Lackey. United States District Court for the Western District of North Carolina, Statesville Division, Docket No. ST-CR-83-19.

In this case my client, John Edward Lackey, was indicted for thirty counts of mail fraud, vote fraud conspiracy and substantive multiple votings in violation of Title 18, United States Code, Sections 371, 1347, 1973i(e) and 2, along with three co-defendants. All defendants were indicted in all thirty counts. I consider this case to be of particular significance because it was part of a highly publicized and ongoing investigation of election irregularities in the rural and mountain counties of western North Carolina. I was sole counsel for John Edward Lackey. Each defendant was separately represented. I was responsible for all areas of preparation and trial with reference to my individual defendant although a small amount of background investigation was shared by the four counsel for the defendants involved. The case was tried to a jury. My client was found guilty on one count and not guilty on twenty-nine counts. All other defendants were convicted of all thirty counts.

My client received a probationary sentence. The other three defendants were sentenced to active terms; in one instance of two years, in two instances of five years. While we accepted the judgment, all co-defendants appealed. Judgment was affirmed in a published opinion, United States v. Mark Douglas Odom, et al., 736 F.2d 104 (4th Cir. 1984). This case was tried August 16-19, 1983, in United States District Court for the Western District of North Carolina before the Honorable

Robert D. Potter, United States District Judge. The United States was represented by Charles R. Brewer, United States Attorney for the Western District of North Carolina; Max O. Cogburn, Jr., Assistant United States Attorney for the Western District of North Carolina, both of the U. S. Attorney's Office, Post Office Box 132, Asheville, North Carolina, 28802, telephone 704/259-0661; and Nancy S. Stewart, Public Integrity Section, Criminal Division, U. S. Department of Justice, Washington, D. C., 20530, telephone 202/724-6896. Representation of the co-defendants was as follows:

Mark Douglas Odom	John E. Hall Hall and Brooks 105 W. Main St. P. O. Box 29 Wilkesboro, NC 28697 PH: 919/667-1111
Joyce Geraldine Beach	Larry S. Moore Moore and Willardson 311 Ninth St. N. Wilkesboro, NC 28659 PH: 919/838-5129
Benny Carol Dyson	William C. Gray, Jr. Ferree, Cunningham & Gray 1 Court Square Wilkesboro, NC 28697 PH: 919/838-5173

10. United States vs. Charles Lee Johnson. United States District Court for the Western District of North Carolina, Charlotte Division, Docket No. C-CR-84-81.

Although this case was technically a misdemeanor, I consider it to be of particular significance. In this case, a Gastonia, North Carolina, police officer was accused of police brutality allegedly occurring May 25, 1983. Shortly after the incident giving rise to the accusation, an FBI investigation began and continued for approximately a year and one-half. The United States Attorney's Office for the Western District of North Carolina conducted a grand jury investigation which stretched over several months of grand jury sessions and ultimately resulted in an indictment charging violation of Title 18, United States Code, Section 242, the indictment being returned in August, 1984. I had been retained in the Spring of 1984 by the City of Gastonia to represent the interest of the officer, even though he was no longer an employee of the Gastonia Police Department, because of the significance of this case to the City of Gastonia, its police department and its citizens, and because of the high amount of adverse publicity which had been generated against the department and law enforcement in general by the investigation in Gaston County, North Carolina. I was sole counsel for the defendant, Charles Lee Johnson. I conducted all pretrial investigation and preparation on behalf of the defense, either personally or through the staff of my law firm. I was sole trial counsel and conducted all phases of trial for the defense. This case was tried to a jury. It was first tried December 12-17, 1984. At the close of the first trial the jury was unable to agree and reported deadlocked after lengthy deliberations. The presiding judge declared a mistrial. We retried the case February 19-21, 1985. The jury returned a verdict of not guilty. This case was tried in United States District Court for the Western

District of North Carolina before the Honorable Barbara DeLaney, United States Magistrate. In the first trial Debra Stuart, United States Attorney's Office, 400 West Trade Street, Charles R. Jonas Federal Building, Charlotte, North Carolina, 28202, telephone number 704/371-6104, represented the United States. In the second trial, Miss Stuart again represented the United States, this time being joined in that representation by Isabelle M. Thabault, Civil Rights Division, Criminal Section, U. S. Department of Justice, Washington, D. C., 20530, telephone 202/633-3835.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In addition to the litigation matters listed above, there are, of course, many other matters of significant litigation. The most significant non-litigation matters which I handled included:

A. The Charlotte City Council retained me to conduct an investigation of allegations of unlawful wiretapping against their city police department. This investigation commenced in June of 1978 and continued well into 1979. This involved relating legal advice to the city council and mayor of Charlotte; conducting extensive hearings and compiling reports to the city council. It involved questions of state and federal criminal and administrative laws as well as civil procedure in the obtaining and court enforcement of subpoenas. It also involved extensive Freedom of Information practice in obtaining federal investigative results.

B. I was retained in 1981 by Statesville, North Carolina's city council to investigate allegations of brutality and discrimination against their police department. This also involved review of court records, conduct of security investigations, advice to city counsel as to legal ramifications of facts found, and offering advice of legal consequence and recommendations as to policies to be changed or adopted.

C. Advising businesses/manufacturers in Statesville and Hickory areas as to compliance with EPA guidelines and representation in negotiation with EPA concerning alleged violations.

D. As mentioned above, a portion of my practice involved representing community groups in land use controversies. The most significant of these was in 1981 when my law partner, Travis Moon, and I represented a group of some few thousand families in the northwest section of Mecklenburg County opposing the location of a landfill in their community. As head of the legal team, I supervised the location and work of experts in such diverse disciplines as geology, hydrology, real estate and economics and appeared as lead counsel in a series of hearings lasting several weeks ultimately resulting in the denial of the land use permits necessary for the location of the landfill. This also involved research in the various local, state and federal land use and environmental statutes and regulations applicable to waste disposal and environmental matters.

E. Between 1984 and 1985, I served as outside counsel to the City of Charlotte assisting the City Attorney in defense of police officers sued under Title 42, United States Code, Section 1983. While none of the matters on which I was consulted went to trial, several were involved in litigation which was either dismissed or settled.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

I have no such continuing relation with any business associates, clients or customers.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In my opinion, the only way for a judicial officer to resolve conflicts of interest is to recuse from the relevant litigation, since the appearance of conflict is potentially as damaging to the judicial function as the conflict itself. So far as determining areas of concern, review of parties and counsel in each case on a case-by-case basis is the way I have dealt with this question in the past on the state and federal trial benches and when sitting by designation with a federal appellate court. I do not anticipate many conflicts arising if I am confirmed for the District of Columbia Circuit since I have no prior associations with any law firms or other entities in that area and since my financial holdings are quite limited.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no plans, commitments, or agreements to pursue outside employment during my service with the court.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

A. 1978 Republican campaign in Mecklenburg County, North Carolina - Candidate Recruitment Chairman - My duties involved meeting with various members of the Party to collect and distill ideas for potential candidates, meeting with potential candidates and other interested individuals and attempting to persuade the best suited to seek public office. This at times involved assisting potential candidates in setting up campaign committees and making campaign plans. During the course of the campaign itself, I played little active role other than as an interested voter.

B. 1979-80 Republican Party Chairman, Mecklenburg County, North Carolina - My duties involved the chief executive duties for the Party as a whole in my county, coordinating the efforts of all Republican campaigns in that county and coordinating the county effort with that of the state. This also included oversight of the candidate recruitment process and campaign planning.

C. 1980 - David Sentelle for County Commission Campaign - I was the candidate and performed the usual functions of a candidate.

D. 1983 - Jim Hutchins for City Council - Campaign Co-Chairman - My office in this campaign was principally titular and I performed little active role.

E. At various times I served as a member of campaign committees for Jesse Helms for U. S. Senate, Marilyn Bissell for Mecklenburg County Commission, Larry Cobb for North Carolina State Senate, and Ronald Reagan for President. In none of these campaigns did I take what I would call a "major" role but was active from time to time in the "nuts and bolts" aspects of those campaigns.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules called for.)

Financial net worth statement and schedules attached as requested.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

"Judicial activism" is a dangerous trait. The Constitution of the United States in Article III places in the Federal judiciary only a power extending to "cases in law and equity" arising under the Constitution and laws of the United States (and in other circumstances set forth in Article III, Section 2). When the judiciary begins to engage in the solution of perceived problems, the imposition of far-reaching policy decisions and broad affirmative duties on governments and societies and the loosening of such jurisdictional requirements as standing and ripeness, it steps beyond the exercise of judicial or adjudicatory power over cases and begins to be a "conscience" or benevolent dictator of political, social and other non-justiciable issues. Article I of the Constitution vests the legislative power in Congress and Article II vests the executive in the President. Neither of these Articles contemplates a usurpation of the functions of the other branches by the judiciary. Any tendency by the judiciary to take upon itself roles outside the adjudication of cases properly brought before it under Article III necessarily invades the functions allocated by the framers to the other branches of government or the rights reserved to the people and the states under Amendments 9 and 10.

Perhaps less strikingly but nonetheless significantly, a court using the case of an individual plaintiff as a vehicle for the imposition of broad ranging policy decisions also is in danger of not providing that plaintiff with the relief to which he, she, or it is entitled in the specific case or controversy properly before the court.

In short, this country is properly governed by persons acting pursuant to the Constitution and laws of this country not by persons acting pursuant to the dictates of their own designs even when those designs are the result of exquisite and well-meaning consciences. To the extent that an activist judiciary, even a well meaning one, goes beyond the due bounds set in the laws and constitutional documents of this country, it becomes a government of men and not one of laws. No matter what the goals of the activist judge, the reserved rights of the people and the structure of limited government come into danger.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

During the years 1977 through 1984, I accepted appointment at limited compensation to represent indigent defendants charged with capital offenses at a fraction of my normal earning capacity and to the extent of literally hundreds of hours of trial and appellate work. Additionally, in other capital cases in which the defendant may not have been an indigent by the standards of North Carolina's courts but was unable to afford counsel of the competence required in capital murder cases, I represented such defendants at greatly reduced fees when I could have used the same professional hours at my normal rate representing white collar defendants in federal and state cases or in other areas of the law. Additionally, during the last year of my state judicial term and the early years of my return to private practice, I served as a board member and defacto legal adviser to a christian prison ministry operating a halfway house for returning male prisoners and other services for incarcerated defendants; for a board of community advisors to a state agency operating a halfway house for returning female inmates and providing re-entry services for them; and, for a community based drug counseling service. While none of these services literally limited its assistance to the indigent, the vast majority of the client population of each was in fact disadvantaged.

I also served as legal counsel to the Lion's Charitable Enterprises, Incorporated, a non-profit corporation affiliated with three local service clubs dedicated to the purpose of fund raising for blind and other handicapped disadvantaged in the piedmont North Carolina area. This involved obtaining the corporate and non-profit status of the entity, negotiating contracts for the presentation of the U. S. Open Equestrian Jumping Championship by the corporation and advising on its day-to-day legal affairs. While I was once voted an honorarium of $100 by the corporation for the negotiation of a contract with a Florida promoter, I otherwise served without compensation.

The above are offered by way of example and not exhaustion.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	8	000	00
U.S. Government securities—add schedule			-0-
Listed securities—add schedule			-0-
Unlisted securities—add schedule			-0-
Accounts and notes receivable:			
Due from relatives and friends	3	500	00
Due from others			-0-
Doubtful			-0-
Real estate owned—add schedule	149	500	00
Real estate mortgages receivable			-0-
Autos and other personal property	40	000	00
Cash value—life insurance	2	000	00
Other assets—itemize:			
IRA-J.C.Bradford&Co.	49	000	00
IRA-Mutual S&L	4	600	00
Total assets	256	600	00

LIABILITIES			
Notes payable to banks—secured			-0-
Notes payable to banks—unsecured			-0-
Notes payable to relatives			-0-
Notes payable to others			-0-
Accounts and bills due			-0-
Unpaid income tax			-0-
Other unpaid tax and interest			-0-
Real estate mortgages payable—add schedule	109	000	000
Chattel mortgages and other liens payable		900	00
Other debts—itemize:			-0-
Total liabilities	109	900	00
Net worth	146	700	00
Total liabilities and net worth	256	600	00

CONTINGENT LIABILITIES		
As endorser, comaker or guarantor	NONE	
On leases or contracts	NONE	
Legal Claims	NONE	
Provision for Federal Income Tax	NONE	
Other special debt	NONE	

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	None other than as shown above		
Are you defendant in any suits or legal actions?			NO
Have you ever taken bankruptcy?			NO

SCHEDULE--ASSETS

Real estate owned:

House and lot located at 798 Rose Hill Road, Asheville, North Carolina	$145,000.00
Partnership interest in 2 condominia, Charlotte, North Carolina	4,500.00
	$149,500.00

Recv'd. 2/6/87
R9.

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

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Lincoln, NE 68501

NINTH CIRCUIT
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Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: DAVID B. SENTELLE
United States Court of Appeals
District of Columbia Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of David B. Sentelle for appointment as Judge of the United States Court of Appeals for the Columbia Circuit.

Our Committee is unanimously of the opinion that Judge Sentelle is "Well Qualified" for this appointment.

Sincerely,

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

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JEFFREY ROBINSON, MINORITY CHIEF COUNSEL

May 28, 1987

Mr. David R. Almond, Esq.
Chairman, ABA Standing Committee on
Ethics & Professional Responsibility
P.O. Box 26724
Oklahoma City, OK 73126

Dear Mr. Almond:

I write to seek the views of the American Bar Association on the interpretation of the ethical standards applicable to judges.

Cannon 2 of the Code of Judicial Conduct directs that "a judge should avoid impropriety and the appearance of impropriety in all his activities." The text of the canon calls on a judge to "conduct himself at all times in a manner that promotes public confidence in the intergrity and impartiality of the judiciary," and to refrain from "allow[ing] his... social... relationships to influence his judicial conduct of judgement." The Commentary to this canon specifically addresses a judge's organizational memberships, as follows:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others, that the judges impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

In the Judiciary Committee's consideration of the nomination of Judge David B. Sentelle to be a U.S. Circuit Judge for the District of Columbia Circuit, questions were raised concerning the applicability of Cannon 2, as explicated by the official commentary. Judge Sentelle belongs to three Masonic organizations that have no black or female members. Subsequent investigation disclosed that the organizations had no stated policy of refusing membership to male members of minority groups, but that each of the organizations explicity denied membership to women. In the debate on the nomination in the Committee, some Senators expressed the view that membership in fraternal organizations ought to be treated differently, for the purpose of applying Cannon 2 or parallel Committee policies, than membership in other organizations. There was also some sentiment for clearer Committee policies on the organizational memberships of judicial nominees.

I believe this is a gray area in which clarification would be useful to the Committee. Accordingly, I would be interested in the views of the American Bar Association on the following questions, based on the history of the drafting and adoption of Cannon 2 and its commentary on its subsequent interpretation and application:

1. Should a judge's membership in a fraternal organization be evaluated differently than a judge's membership in a social, business, or professional organization, for purposes of determining whether the organization's membership policies are invidiously discriminatory, and therefore whether the judge's continued membership is inappropriate? If so, what factors should determine whether an organization is considered fraternal, and how should the standards for determining the question of invidiousness differ between fraternal and other organizations?

2. Should distinctions other than fraternal and non-fraternal be recognized, for purposes of applying Cannon 2 and its commentary? For example, should the standard for invidiousness in examining the membership policies of a country club differ from the standard applicable to a civic organization? a business organization? a service organization? a professional organization?

3. What if any distinctions should be drawn among exclusionary memberships practices based on the different factors listed in the Commentary to Cannon 2 (i.e., race, sex, religion, and natural origin), for purpose of determining

whether an oranization's membership practices are invidiously discriminatory? For example, should an explicit policy of denying membership to women dictate the same conclusion on the issue of invidiousness as an explicit policy of denying membership to blacks? If, for purposes of the cannon, fraternal organizations should be treated differently than other kinds of organizations, please provide a seperate response to this question in the case of fraternal and other organizations.

4. If a judge determines that an organization to which he or she belongs does practice invidious discrimination, is the judge's resignation from the organization sufficient to dispel any appearance of impropriety, or to repair any perception of impaired impartiality?

I look forward to receiving your response as soon as possible, but in any event within three weeks. I hope that the responses will prove useful to the Judiciary Committee as it carries out its responsibility to review nominations to the federal courts.

Thank you in advance for your help.

Sincerely,

Paul Simon
United States Senator

cc: Irene Emselleon
Jeanne Gray

AMERICAN BAR ASSOCIATION

Standing Committee on
Ethics and
Professional Responsibility
750 North Lake Shore Drive
Chicago, Illinois 60611
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ADMINISTRATIVE ASSISTANT
Alix J. Mitchell

BY EXPRESS MAIL June 12, 1987

The Honorable Paul Simon
United States Senator
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Simon:

I am writing in response to your letter of May 28, 1987, which was received June 4. You request the views of the American Bar Association on the interpretation of certain ethical standards applicable to judges, specifically those involving potential invidious discrimination. You indicate your request arises in the context of the Senate's consideration of Judge David B. Sentelle's nomination to the United States Court of Appeals for the District of Columbia Circuit.

As you know, the American Bar Association has already approved Judge Sentelle as "well qualified" for the federal judiciary, first on August 5, 1985, in connection with his nomination to the United States District Court and most recently on February 3, 1987, in connection with his nomination to the United States Court of Appeals. Our Committee is not in a position, nor would it wish, to comment further on his qualifications.

With respect to the specific questions you posed, a few general comments about our normal function and practice may be appropriate. The American Bar Association is a voluntary association of lawyers with no official regulatory authority over lawyers or judges. The Association has developed model rules which deal with professional conduct of lawyers and judges and which have frequently been adopted by courts and other bodies with regulatory authority. To assist lawyers and judges in complying with the rules which may apply to them, this Committee, on behalf of the Association, issues informative opinions from time to time interpreting the Association's model rules. With few exceptions, however, it issues opinions only in response to inquiries from lawyers or judges as to the propriety of their own prospective professional conduct.

We do note the "invidious discrimination" language which you quote in your letter appears only in the explanatory commentary to Canon 2 of the Code of Judicial Conduct; the actual language of Canon 2 is the more general language you also quoted in your letter. The commentary language was added in 1984 after most jurisdictions which apply the Code had adopted the Code.

The language of the commentary relating to membership in organizations that practice invidious discrimination was considered at length by various groups within the Association. The final language is the Association's policy statement expressing concern about judicial membership in organizations which practice invidious discrimination. It manifests, however, a recognition that it is exceedingly difficult to establish an objective definition of "invidiousness" appropriate for general application. This is reflected in the last sentence of the applicable paragraph which reads:

> "Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination."

The Committee has not previously had occasion to address the questions asked in your letter, and I am not in a position to respond to those questions at this time. At such time in the future as the Committee may give further consideration to the invidious discrimination language of the commentary, you may be assured that the questions you have asked, along with others which may be directed to the Committee, will be brought to the attention of the full Committee for its consideration.

Very truly yours,

David R. Almond

DRA:eh

cc: Eugene C. Thomas, Esq.

DAVID S. DOTY

Birth:	June 30, 1929	Anoka, Minnesota
Legal Residence:	Minnesota	
Marital Status:	Married	Mary Francis Wagner 3 children
Education:	1958 - 1952	University of Minnesota B.A. degree
	1958 - 1961	University of Minnesota Law School LL.B. degree
Bar:	1961	Minnesota
Military Service:	1952 - 1958	United States Marine Corps Captain
Experience:	1961 - 1962	Felhaber, Larson, Fenlon & Vogt Associate
	1962 - present	Popham, Haik, Schnobrich, Kaufman & Doty Associate Partner
Office:	4344 IDS Center Minneapolis, Minnesota 55402 612 333-4800	
Home:		

To be United States District Judge for the District of Minnesota

---

QUESTIONNAIRE FOR JUDICIAL NOMINEES

Responses of David S. Doty

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   David S. Doty

2. Address: List current place of residence and office address(es).

   HOME: 23 Greenway Gables, Minneapolis, MN 55403.

   OFFICE: 4344 IDS Center, Minneapolis, MN 55402.

3. Date and place of birth:

   6/30/29 - Anoka, Minnesota

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Married; Mary Francis Wagner, Housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Minnesota, 9/48-6/52 BA 1961
University of Minnesota Law School 9/58-6/61 LLB (JD) 1961

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1952-1958	U.S.M.C. (See 7 below)
1960	I.D.S. - Summer law clerk
1961-1962	Felhaber, Larson, Fenlon & Vogt
1962-Present	Popham, Haik, Schnobrich, Kaufman & Doty, Ltd.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes. 6/52-9/58, USMC, Captain, 056606, Honorably Discharged.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

University of Minnesota Board of Honor, 1952

Battalion Commander, University of Minnesota NROTC, 1951-52

Received LLB (JD) cum laude in 1961 from University of Minnesota.

Deans List, University of Minnesota Law School, 1960, 1961.

Member of University of Minnesota Law Review Volumes 43 and 44 (1959-61); Editor, Volume 44.

While in law school received Minnesota State Bar Association Scholarship Award.

Martindale-Hubble - AV Rating Since 1972

Who's Who in Law - 1984

Who's Who in America - 1985

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Hennepin County Bar Association

President - 1975-76
President-Elect - 1974-75
Secretary - 1973-74

Chair Legal Fee Arbitration
Ethics Committee 1966-72
Long Range Planning; Articles and By-Laws Committee

Minnesota State Bar Association

President 1984-85
President Elect 1983-84
Secretary 1980-83
Board of Governors 1976 - Present
Chair - Fee Arbitration Committee
Chair - Law Office Management Committee
Finance, Continuing Legal Education, Bar Media, Association Governance Committees.
Litigation and Labor Law Sections

American Bar Association

Litigation, Labor and Administrative Law Sections
Forum Committee on Construction Law
Committee on Professional Liability, Litigation Section, (Co-chair of Architects/Engineers Subcommittee)

American Judicature Society

American Bar Foundation Fellow

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

6 O'Clock Club; Minnesota Law School Alumni Association (President, Director); Minnesota Law School Board of Visitors; Minnesota IR (various District and ward offices); Minnesota Hearing Society (Board); Minnesota Center for Torture Victims (Board); Minneapolis Foundation (former Trustee); Minnesota Volunteer Attorney Program (former Board), Citizens League, Izzak Walton League; Minneapolis Chamber of Commerce (committee chair).

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Court/Administrative Body	Date	License No.
Minnesota Supreme Court	10/13/61	23887
U.S. Federal District Court	4/23/62	
U.S. Appeals Court Eighth Circuit	5/26/76	
U.S. Appeals Court Ninth Circuit	2/24/76	
U.S. Supreme Court	9/1/82	

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech and they are readily available to you, please supply them.

Numerous briefs, memos, etc. involving cases.

1) Title: Note/Trust Depreciation Accounting and the Minnesota Statute on Accumulations.
Publisher: Minnesota Law Review
Dated: March, 1962; Vol. 46; No. 4.

2) Title: Proof of Economic Necessity in Reducing the Work Force -- Dodging an ADEA Bullet.
Evidentia published by: Criterion Incorporated
Dated: September, 1983; Vol. 7, No. 2.

3) Title: Equal Employment Opportunity -- Special Problems of the Eighties.
Presented to: National Soft Drink Association Legal Briefing Conference
Dated: September 20-22, 1982

4) Title: President's Page/David S. Doty
Publisher: Minnesota State Bar Association
Dated: Monthly publication - July, 1984 through June, 1985.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. August 11, 1986. (See attached.)

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None as a judge. I was appointed a Special Master in an EEO case, 1984. While an officer in the USMC I was a Summary Court Martial Officer; President of a Special Court Martial Board and served on the panel of a General Court Martial Board (1955-58). I have also served on the National Panel of Arbitrators, American Arbitration Association, since 1968.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

N/A.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Yes. Minneapolis Public Library Board; elected city-wide in 1973, years total (1971-79). Ran unsuccessfully for Library Board in 1971, but was appointed for two years.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

N/A.

2. whether you practiced alone, and if so, the addresses and dates;

N/A.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

7/61-8/62 - Felhaber, Larson, Fenlon & Vogt, 1st Bank Building, St. Paul, MN. (Associate.)

7/62-Present - Popham, Haik, Schnobrich, Kaufman & Doty, 4344 IDS Center, Minneapolis, MN 55402. (Associate, Senior Partner [Senior Attorney], President, Board Member.)

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Insurance Litigation, Professional Liability Litigation, Labor and EEO Litigation, Securities Litigation, Labor Contract Administration.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Insurance Companies; Corporations; Transit Authority; Securities Class-Action Plaintiffs; Individuals. See b. 1. above for areas of concentration.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently. No variance.

2. What percentage of these appearances was in:

(a) federal courts; 45%
(b) state courts of record; 40%
(c) other courts.
15% - various administrative bodies.

3. What percentage of your litigation was:

(a) civil; 100%
(b) criminal. 0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I am unable to recall or determine all such cases since 1961, but during the last five years I have tried to verdict eleven cases; chief counsel in nine, sole counsel in two.

5. What percentage of these trials was:

(a) jury; 36%
(b) non-jury 63%.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) In Re Wickes, Inc. Securities Litigation, 1983, Fed. Sec. L.Rep. (CCH) Paras. 99055,056,057, 085.

This was a multiparty class-action securities fraud case. It was significant because of the size of the case, the parties, the complexities of the issues litigated, including bankruptcy issues and the favorable result. We represented plaintiffs Gretchen Groebner and Lillian Hendrickson. I was the lead counsel in the action commenced against Wickes and Gamble-Skogmo, Inc., arguing many of the motions, taking part in the Mutli-District Panel Proceedings and negotiating the final settlement. The case was eventually settled.

a) 1983-1984

b) Federal District Court, Southern District of California, Judge Enright.

c) The names of co-counsel and counsel for the other parties is voluminous, but a representative list would include:

Leonard Barrack, (counsel for co-plaintiffs), Suite 2100, 1845 Walnut Street, Philadelphia, PA 19103. (215) 963-0600; William S. Lerach (counsel for co-plaintiffs), 2000 Central Savings Tower, 225 Broadway, San Diego, CA 92101-5050, (619) 231-1058; Edward Krugman, (counsel for Peat, Marwick, Mitchell & Co.) 80 Pine Street, New York, NY 10005, (212) 825-0100;
Gordon G. Busdicker, (counsel for former officers/directors of Gamble-Skogmo, Inc.) 2300 Mutlifoods Tower, Minneapolis, MN 55402, (612) 371-5300; Kenneth R. Heitz, (counsel for Wickes Co., Inc.) 1800 Avenue of the Stars, Suite 900, Los Angeles, CA 90067, (213) 277-1010; Robert W. Hallock, (counsel for Wickes' former officers/directors) 200 East Randolph Drive, Chicago, IL 60601, (312) 861-2000; Joseph E. Coughlin, (counsel for Duff & Phelps), 115 South LaSalle Street, Chicago, IL 60603, (312)

443-0700; Darwin J. Lookingbill (counsel for Dain Bosworth, Inc.) 4824 IDS Center, Minneapolis, MN 55402 (612) 332-6451.

2. Khambata, et al. v. Sperry Rand, et al., File No. Civ. 3-76-227. This was an age discrimination case involving multiple parties and complex facts all arising from a layoff of professionals at a computer manufacturing company. This case was significant because of the size, the legal issues involved, the fact that it was tried for ten weeks to a jury and the result, a defendant verdict. We represented Sperry Rand Corp. I was lead counsel throughout preparation and trial. The case resulted in a verdict for the defendant.

   a) The case was tried between April 12, 1982 and June 16, 1982.

   b) Federal District Court of Minnesota, Judge Magnuson.

   c) The plaintiffs were represented by Robert Reinhart, 80 South Eighth Street, Minneapolis, MN 55402, (612) 332-6451.

3. Jorstad v. IDS Realty Trust, 489 Fed. Supp. 1180 (1982). This was a securities fraud class action. The significance of this case was the complex legal issues involved with a securities fraud action and class determination as well as the result, an approximately $92 Million Dollar recovery. We represented the plaintiffs. I participated as lead counsel. The case was eventually settled.

   a) 1981 through 1983.

   b) Federal District of Minnesota, Judge Miles Lord.

   c) Defendant was represented by Henry Halliday (deceased) and Edward Schwartzbauer, 220 South 6th Street, Minneapolis, MN, 55402, (612) 340-2782, and Joe Walters, 80 South Eighth Street, Minneapolis, MN 55402, (612) 343-1220.

4) Elliot, et al. v. Sperry Rand Corp., et al., 554 Fed.2d 868 (8th Cir., 1977), 79 F.R.D. 580 (D. Minn. 1978) 680 Fed.2d 1225 (8th Cir. 1982); cert. den. 89 L.Ed.2d 293 (1985). This was a class action sex discrimination case brought against an employer and the union representing the individuals. It was significant because of the class action issues decided and the complex nature of the proof of sex discrimination by use of statistics, and the result. We represented the employer, Sperry Rand Corporation. I was the lead counsel. The case, after five weeks of trial, was ultimately settled.

   a) October, 1978 through December, 1978.

   b) Federal District of Minnesota, Judge Earl Larson.

c) Richard Bland, (counsel for plaintiffs), 80 South Eighth Street, Minneapolis, MN 55402, (612) 338-0661; Hy Edelman, (counsel for International Union) 801 Nicollet Mall, Minneapolis, MN 55402, (612) 339-8015; James Hansing (attorney for local union), 120 South Sixth Street, Minneapolis, MN 55402 (612) 333-6113.

5) United Handicap Federation, et al. v. Andre, et al., 409 F.Supp. 1297 (1976) 558 F.2d 413 (1977), 489 F.Supp. 1040 (1979). This was a case involving the application of the Rehabilitation Act to the local transit authority litigating the requirement of putting lifts on all of the buses owned by the transit authority. The case was significant because it was one of the first cases in which the court held that the Rehabilitation Act did not require lifts to be placed on all buses; it also involved multiple parties, including federal parties, and a complex determination of rights under a federal statute. We represented the defendant Andre and the Metropolitan Transit Commission. I was lead counsel. The case was disposed of on two motions for summary judgment with an intervening appeal.

a) 1976 through 1979.

b) Federal District Court of Minnesota, Judge Alsop.

c) William Mahlum, North Central Life Tower, St. Paul, MN 55101, (612) 292-1661.

6) Mattson v. Lloyds of London, 385 N.W.2d 854 (1985). This was a "bad-faith" action brought against an insurer arising out of a judgment exceeding policy limits in a Dram Shop case. It is significant because of the nature of a "bad-faith" case, and the underlying law relating to the dissolution of a corporation insured by Lloyd's. We represented Lloyd's of London. I was sole counsel during the trial and lead counsel in the appeal. The trial resulted in a verdict for the plaintiff but was overturned on appeal by the Supreme Court based upon the invalidity of the assignment creating the right to bring the action.

a) The case was tried for two weeks in 1984.

b) Minnesota District Court, Judge Kane.

c) Plaintiffs were represented by Richard Hunegs, 608 2nd Avenue South, Minneapolis, MN 55402, (612) 339-4511.

7) Metropolitan Transit Commission v. Twin Cities Lines, Inc., 301 Minn. 386 224 N.W.2d 121 (1974). This was a case involving the taking by eminent domain of an ongoing transit system by the transit authority in the Twin Cities area. It was significant because of the nature of the

case involving complex evaluation and expert testimony and the result. We represented the Metropolitan Transit Commission. I was lead counsel. After an initial trial before condemnation commissioners, the matter was appealed to a jury, then to the Supreme Court, and upon reversal, the case was settled.

a) The case was initially tried during the period of 1970 through 1971. The appeal was tried to a jury in 1972.

b) District Court of Minnesota, Judge Iverson.

c) Arthur Geer (deceased) and James Roegge (counsel for Twin Cities Lines) 80 South Eighth Street, Minneapolis, MN 55402 (612) 338-0661.

8) Anderson, et al. v. Francis I. duPont, et al., 291 F. Supp. 705 (1968). This was a complex securities and commodities action in which the plaintiffs were attempting to recover from various parties losses suffered from a "Ponzi" scheme. The case was significant because of the complex securities and commodities issues involved and the complex trial facts. We represented Francis I. duPont Co., a brokerage house. I was sole counsel. The case was tried to a jury and resulted in a defendants verdict for our client.

a) The case was tried in 1969.

b) Federal District Court of Minnesota, Judge Earl Larson.

c) Harold D. Field, (counsel for plaintiffs), 100 South 5th Street, Minneapolis, MN 55402 (612) 337-1500.

9) Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d (1971). This was a personal injury action. The case was of significance because Minnesota had just passed a comparative negligence statute and the issue of plaintiff's negligence and its relation to the assumption of risk became a key issue. We represented the plaintiff. I was the sole lawyer in the trial and appeal. The case was tried to a jury which awarded a verdict to the plaintiff but held that assumption of a risk would obviate the verdict. The Supreme Court reversed the trial court and the verdict was reinstated.

a) The case was tried for four weeks during 1970.

b) Minnesota District Court, Judge Amdahl.

c) Arthur Geer, (attorney for defendant), (now deceased).

10) Local P-9 v. Geo. A. Hormel & Co. 599 F.Supp 319 (1984), 776 F.2d 1393 (1985). This case involved the enforcement of a labor arbitration decision. It is

significant in that the arbitrator issued two opinions and the law is not settled as to how that situation should be treated. We represented Hormel. I was lead counsel participating in the summary judgment motion and appeal. The case was decided by the court on summary judgment motion, appealed and reversed.

a) The case was heard in 1984.

b) Federal District Court of Minnesota, Judge MacLaughlin.

c) Robert H. Nichols, (attorney for Local P-9) Suite 4750-1, One IBM Plaza, 330 North Wabash Avenue, Chicago, Illinois 60611 (312) 467-0590.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which you did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege).

Other than those matters reported in 18 above, a representative listing of significant legal matters include:

a) Since 1967 I have acted as general counsel for the Twin Cities Transit Commission. That representation included countless litigation matters involving claims, regulatory EEO and personnel issues in addition to countless labor arbitration hearings and labor negotiations.

b) Since 1968 I have represented the Minneapolis Park and Recreation Board that involved the same, but fewer of the issues discussed above. One major case, State of Minnesota v. Minneapolis Park Board was appealed to the U.S. Supreme Court and involved the taking, for highway purposes, of a famous park in Minneapolis containing Minnehaha Falls.

c) I have tried and otherwise handled numerous cases on behalf of insured architects, engineers and attorneys involving alleged malpractice.

d) I am currently involved in representing Unisys Corporation in a major construction law dispute with its architect; Northern States Power Company in a major commercial dispute on a "take or pay" energy contract and Hyundai Corporation in a Miller Act claim against the contractor for the Western Area Power Authority.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

I am currently covered by a deferred compensation agreement with my law firm that is granted in lieu of a buy-out of my interest in on-going work and receivables; no other such arrangements.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

As to the deferred compensation agreement referred to above, the firm has agreed to purchase an annuity contract should I be nominated and confirmed. As to investments, I intend to place all of them in a blind trust or a plan that would shield me from any knowledge of specific investments or activity.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. Campaign Chairman for a state senator Wayne Popham, 1960-61; Co-chair of Law Students for Nixon, 1959-60; Congressional District Chair of Al Quie for Governor, 1978.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

See No. 1 and 2 above.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	7	593	
U.S. Government securities—add schedule	—		
Listed securities—add schedule	1	132	
Unlisted securities—add schedule	635	094	
Accounts and notes receivable:	—		
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	1008	398	
Real estate mortgages receivable	—		
Autos and other personal property	78	000	
Cash value—life insurance	34	000	
Other assets—itemize: IRA's	21	229	
E.F. HUTTON - CASH RESERVE	18	456	
E.F. HUTTON - [illegible] CASH [illegible]	85	545	
E.F. HUTTON - BOND FUND	78	749	
Total assets	1,967	894	

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured	10	000	
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	93	242	
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	103	242	
Net worth	1864	652	
Total liabilities and net worth	1967	894	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	—		
On leases or contracts	—		
Legal Claims	—		
Provision for Federal Income Tax	—		
Other special debt	—		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	NO		
Are you defendant in any suits or legal actions?	YES - SEE ANSWE		
Have you ever taken bankruptcy?	NO		

2/9/87

SCHEDULES

LISTED SECURITIES:

533 SHS MAGELLAN PGT.	$ 1132

UNLISTED SECURITIES:

POPHAM, HAIK PENSION TRUST	$ 485,851
COMPASS INVESTORS P-SHIP	138,281
POPHAM, HAIK STOCK	11,000

REAL ESTATE:

HOMESTEAD - TOWN HOUSE		250,000
CHALET COURT - LANG-NELSON LTD P-SHIP		116,117
VALLEY VIEW -	"	362,724
PARK 100 -	"	60,480
CHATEAU MONTEREY (PARK WIND)	"	129,075
ANTHONY JAMES	"	90,000

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance resolution;

(b) A tendency the the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I firmly believe that the Constitutional, statutory and common law powers of and restrictions on the federal judiciary must be adhered to. Federal District Court judges must address only the "cases" before them, adhere to the legislative directives laid down by Congress and follow the legal precedents established by the U.S. Supreme Court, the Court of Appeals and the State Supreme Courts, when applicable. Our governmental system relies on various "checks and balances", and for it to successfully operate each branch of government, including the judicial, must scrupulously adhere to its proper role.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

The very motivation for my becoming a lawyer is grounded on a concern for equal justice under the law. I came from a relatively poor family and saw what effect the law could have on my family and friends. I have also acted as a plaintiff's attorney much of my career, and with both class actions and contingent fee cases, often had to be satisfied, and was, with justice obtained. More specifically, in other areas of interest I am active in the charitable and legal activities of my church and serve, or had served, on the boards of many groups devoted to equal justice under the law. (See I-10 above). As president of the Hennepin County Bar Association I was active in establishing a free clinic (Legal Advice Clinics) to dispense legal advice to the needy. I still support the clinic. I also helped establish a minority hiring plan while bar president that was funded by our bar foundation. As president of the Minnesota State Bar I strengthened our state-wide volunteer attorney program that helps the poor (Minnesota Legal Services Coalition) and established, with our Attorney General, a special program to aid indigent or distressed farmers. While president, the bar association also began a program with the minority lawyers to make certain that minority students got into law school and then found jobs with larger firms upon graduation. In addition, as many lawyers do, I have represented numerous individuals needing legal services on a pro-bono basis over the years of my practice. I have also helped raise thousands of dollars for legal aid and other law-related activities aimed at achieving equal justice under law and providing legal services to the poor.

Rec'd 2/10/87
R

AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

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Ralph I. Lancaster, Jr.
One Monument Square
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SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101

Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
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Washington, DC 20006

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312/988-5701

February 6, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: DAVID S. DOTY
United States District Court
District of Minnesota

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of David S. Doty for appointment as Judge of the United States District Court for the District of Minnesota.

Our Committee is unanimously of the opinion that Mr. Doty is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

RICHARD J. DARONCO

Birth:	August 1, 1931	New York City
Legal Residence:	New York	
Marital Status:	Married	Joan O'Rourke Daronco 5 children
Education:	1959 -- 1953	Providence College BA. degree
	1953 - 1956	Albany Law School LL.B. degree
Bar:	1958	New York Bar
Military Service:	1956 - 1958	United States Army
Experience:	1958 - 1959	Galli, Terhune, Gibbons & Mulvahill Associate
	1959 - 1971	King, Edwards & O'Connor Partner
	1971 - 1974	Family Court Judge New York State
	1974 - 1979	County Judge Westchester County Court
	1979 - present	Supreme Court Justice Ninth Judicial District New York State
Office:	Courthouse 111 Grove Street Chambers, 15th Floor White Plains, New York 10601 914 [illegible]	
Home:		

[illegible]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   RICHARD JOSEPH DARONCO.

2. Address: List current place of residence and office address(es).

   207 Corona Avenue
   Pelham, New York 10803

   Courthouse
   111 Grove Street
   Chambers, 15th Floor
   White Plains, New York 10601

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Married - Joan Regina O'Rourke Daronco. Wife is presently a part time travel agent with Pelham Travel, 102 Fifth Avenue, Pelham, New York.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Providence College, September, 1949 - June, 1953, B.A.

Albany Law School - Union University, September, 1953 - June, 1956, LL.B.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1958 - 1959, Galli, Terhune, Gibbons & Mulvahill, Esqs., 90 John Street, New York, N.Y., Associate.

1959 - 1971, King, Edwards & O'Connor, Esqs., 2 William Street, White Plains, N.Y. 10601, Partner in firm.

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes, September, 1956 - August, 1958, United States Army, PFC, Fourth Regimental Combat Team, US 51379713, Honorable Discharge.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Achievement Award recipient - Westchester County Chapter, American Committee on Italian Migration (ACIM) - 1983;

"Man of the Year" Award - Enrico Fermi Scholarship Foundation - 1978;

"Man of the Year" Award - Pelham Civic Association - 1976;

Trustee, St. Catharine's Parish, Pelham, appointed by New York Archdiocese;

Who's Who in American Colleges and Universities, 1953 Edition (nominated by faculty and student body).

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Association of Justices of the Supreme Court of the State of New York;

American Justinian Society of Jurists;

New York State Bar Association;

Executive Committee Young Lawyers Section 1960 - 1963;

Westchester County Bar Association.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies.

None.

Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Advisory Committee, Pace University Law School;

Pelham Volunteer Fireman's Association;

Pelham Civic Association;

Holy Name Society, St. Catharine's Parish;

Pelham Knights of Columbus.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, May, 1967;

United States Court of Appeals for the Second Circuit, January, 1962;

Supreme Court of the State of New York, October, 1958.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Michael O'Brien v. Loretta O'Brien, 114 Misc. 2d 233 (New York Reports).

In the Matter of Charles M. White v. Calvin Green, 70 Misc. 2d 28 (New York Reports).

In the Matter of Carl G. Anonymous, a Physically Handicapped Child.
In the Matter of Barry T. Anonymous, a Physically Handicapped Child, 78 Misc. 2d 453 (New York Reports).

13. Health: What is the present state of your health? Excellent.

List the date of your last physical examination. July, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Supreme Court Justice, Ninth Judicial District, Supervising Judge of the Criminal Parts, Ninth Judicial District - January, 1979 to date;

Westchester County Court Judge - April, 1974 - January, 1979;

Family Court Judge (New York State) - August, 1971 - April, 1974.

The Family Court deals with matters arising out of intra-family conflict. The County Court is the major criminal Court in New York State (outside the City of New York) where felony cases are tried. The Supreme Court in New York State is the highest trial Court of general jurisdiction. Contract, tort, matrimonial and equity cases are routinely tried in this Court.

All of the aforementioned are elected positions, however, I was appointed by New York State Governor Rockefeller to fill a vacancy in the Family Court in August of 1971 and thereafter elected to a 10 year term in Westchester County. In April of 1974, I was appointed by New York State Governor Wilson as a Westchester County Court Judge and thereafter elected to a 10 year term in November of that year. In November of 1978, I was elected to a 14 year term as a New York State Supreme Court Justice.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written.

Michael O'Brien v. Loretta O'Brien, 114 Misc. 2d 233 (New York Reports).

Ladas & Parry, a Partnership v. Lawrence E. Abelman, Gabriel M. Frayne, Sidney Jack Newton, William J. Rezac, William J. Kopacz and Abelman, Frayne & Rezac, a Partnership, Index No. 14050/80, Supreme Court, Westchester County.

In the Matter of the Application of Michael Pidgeon v. Village of Croton-on-Hudson, Index No. 15472/80, Supreme Court, Westchester County.

In the Matter of Charles M. White v. Calvin Green, 70 Misc. 2d 28 (New York Reports).

Ilse Jorgensen v. Arnold C. Jorgensen, Index No. 19394/79, Supreme Court, Westchester County.

In the Matter of Carl G. Anonymous, a Physically Handicapped Child.
In the Matter of Barry T. Anonymous, a Physically Handicapped Child, 78 Misc. 2d 453 (New York Reports).

Board of Education, Lakeland Central School District of Shrub Oak v. Jeffrey N. Powers, Index No. 10799/78, Supreme Court, Westchester County.

People of the State of New York v. Elizabeth Isolini, Misc. No. 9208/85, Ind. No. 9857/85, Supreme Court, Westchester County.

People of the State of New York v. Raymond Bonazzo, Indictment No. 220/74, County Court, Westchester County.

(2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings.

To my knowledge I have never been reversed from any trial other than O'Brien v. O'Brien cited above, in which instance the New York State Court of Appeals reversed the appellate court and adopted my decision. I have been reversed over the past 15 years from time to time on motions but never with significant criticism of my substantive or procedural rulings.

(3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Elected Trustee of Village of North Pelham 1961 - 1966;

Appointed Town Attorney, Town of Pelham 1966 - 1971;

Appointed Counsel for Zoning Board of Appeals, Village of North Pelham 1968 - 1971;

Appointed Arbitrator by American Arbitration Association 1965 - 1971.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No.

2. whether you practiced alone, and if so, the addresses and dates;

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

October, 1958 - January, 1959, Galli, Terhune, Gibbons & Mulvahill, Esqs., 90 John Street, New York, N.Y., Associate.

January, 1959 - August, 1971, King, Edwards & O'Connor, Esqs., 2 William Street, White Plains, N.Y. 10601, Partner in firm.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

October, 1958 - January, 1959, trial preparation and pleadings.

January, 1959 - August, 1971, trial attorney and general practice.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I and the other members of our law firm appeared in Court regularly representing corporations and individuals insured by various casualty insurance companies in the defense of civil lawsuits. I also represented clients in real estate transactions and in estate matters.

In addition, I served as Town Attorney (on a part time basis) for the Town of Pelham from 1966 to 1971 and as counsel to the Zoning Board of Appeals for the Village of North Pelham (on a part time basis) from 1968 to 1971 dealing with municipal law.

Among my clients were the following: Insurance Company of North America, Allstate Insurance Company, Continental Insurance Companies, Nationwide Insurance Company, American Home Insurance Company, Town of Pelham and Village of North Pelham.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I appeared in Court from 1959 to 1971 as a trial attorney almost daily, and since 1971, as a trial judge, with the exception of the period September, 1983 until January, 1985, when I served as New York State Deputy Chief Administrative Judge for Courts Outside New York City.

2. What percentage of these appearances was in:

(a) federal courts;

None.

(b) state courts of record;

99%.

(c) other courts.

1%.

3. What percentage of your litigation was:

(a) civil;

As practicing attorney, 99%. As judge, 50%.

(b) criminal.

As practicing attorney, 1%. As judge, 50%. I am presently serving as Supervising Judge of the Criminal Parts, Ninth Judicial District.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 500 over a 12 year period as sole counsel.

5. What percentage of these trials was:

(a) jury;

99.5%.

(b) non-jury;

.5%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Since I have not practiced law in over 15 years, I cannot recall with specificity individual litigated matters but can set forth the names of attorneys with whom I tried cases and judges before whom I appeared on a regular basis, as follows:

Judges

Supreme Court Justice Hon. James D. Hopkins (retired, former Associate Justice of Appellate Division, Second Department), 9 Sterling Road, Armonk, N.Y. 10504.

Supreme Court Justice Hon. Theodore Kelly, Courthouse, New City, N.Y. 10956;

Supreme Court Justice Hon. Morrie Slifkin (retired), Hudson House, P.O. Box 7221, Ardsley, New York 10503;

Supreme Court Justice Hon. Joseph F. Gagliardi, 111 Grove Street, White Plains, N.Y. 10601;

Supreme Court Justice Hon. Morton B. Silberman (retired), 99 Court Street, White Plains, N.Y. 10601;

Supreme Court Justice Hon. P. Raymond Sirignano (retired) 72 Douglas Place, Mt. Vernon, N.Y. 10550;

Supreme Court Justice Hon. Frank S. McCullough (retired), 550 Mamaroneck Avenue, Harrison, N.Y. 10528;

Supreme Court Justice Hon. George M. Fanelli (retired), 30 Clinton Place, New Rochelle, N.Y.;

Counsel

Supreme Court Justice Hon. Vincent Gurahian, 111 Grove Street, White Plains, N.Y. 10601;

Supreme Court Justice Hon. Anthony J. Ferraro, 111 Grove Street, White Plains, N.Y. 10601;

Henry Miller, Esq., 99 Court Street, White Plains, N.Y. 10601;

James F. Donohue, Esq., 199 Main Street, White Plains, N.Y. 10601;

John W. Keegan, Esq., 81 Main Street, White Plains, N.Y. 10601;

Kingdon P. Locker, Esq., 99 Court Street, White Plains, N.Y. 10601;

Arthur J. Voute, Esq., 170 Hamilton Avenue, White Plains, N.Y. 10601;

Joseph A. Lichtenthal, Esq., 175 Main Street, White Plains, N.Y. 10601;

Arthur R. Calger, Esq., 175 Main Street, White Plains, N.Y. 10601;

Harry A. Fox, Esq., 84 S. Liberty Drive, Stony Point, N.Y. 10980.

The most significant cases over which I presided were:

People of the State of New York v. Richard Herrin, Indictment No. 77-00565, Supreme Court, Westchester County.

People of the State of New York v. Willie Profit, Sam Ayala and James Walls, Indictment No. 77-00557, Supreme Court, Westchester County.

People of the State of New York v. Saverio Periello, Indictment No. 75-01279, Supreme Court, Westchester County.

In the Matter of the Application of Jacqueline Machado Macedo, for the abrogation of the order of the adoption of Julian Alexander Ansley de Almeida Araujo, a minor by Jacqueline de Almeida Araujo (now Jacqueline Machado Macedo) and Jose de Almeida Araujo, as adoptive parents, Docket No. A-372-1971, Family Court, Westchester County.

Estate of Prill v. Consolidated Edison Company of New York, et al, Supreme Court, Westchester County, 1982.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege).

See item 18 above.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In any possible conflict of interest situation, I have in the past and would continue to disqualify myself from presiding in the matter.

With respect to federal court, I would comply with Title 28, United States Code Judiciary and Judicial Procedure Chapter 21 and the Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

Yes. I hope to continue as Adjunct Professor for the Fall evening session at Pace University School of Law, and the Spring evening session at Fordham University Law School, one evening per week.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

1969 County campaign coordinator for Edwin G. Michaelian, Republican candidate for County Executive, Westchester County, New York.

1961 through 1968 campaign chairman for various local Republican town and village elections, Pelham, Westchester County, New York.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	15	000	00
U.S. Government securities—add schedule		0	
Listed securities—add schedule	277	489	00
Unlisted securities—add schedule		0	
Accounts and notes receivable:			
Due from relatives and friends	6	500	00
Due from others		0	
Doubtful		0	
Real estate owned—add schedule	870	000	00
Real estate mortgages receivable		0	
Autos and other personal property	35	000	00
Cash value—life insurance	5	000	00
Other assets—itemize:	34	500	00
See attached Schedule			
Total assets	1,243	489	00

LIABILITIES			
Notes payable to banks—secured		0	
Notes payable to banks—unsecured		0	
Notes payable to relatives		0	
Notes payable to others		0	
Accounts and bills due	1	000	00
Unpaid income tax		0	
Other unpaid tax and interest		0	
Real estate mortgages payable—add schedule	16	000	00
Chattel mortgages and other liens payable		0	
Other debts—itemize:		0	
Total liabilities	17	000	00
Net worth	1,226	489	00
Total liabilities and net worth	1,243	489	00

CONTINGENT LIABILITIES		0	
As endorser, comaker or guarantor		0	
On leases or contracts		0	
Legal Claims		0	
Provision for Federal Income Tax		0	
Other special debt		0	
		0	

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)		0	
Are you defendant in any suits or legal actions?		0	
Have you ever taken bankruptcy?		0	

ASSETS

Listed securities -

1,000 shares of Cal Jockey (Symbol CJOCA), over the counter, approximately $25.00 per share	$ 25,000.00	
2,000 shares of Wolf Financial Group, Inc. (Symbol WOFG), over the counter, $4.25 per share	8,500.00	
2,025 shares of Service Corporation (Symbol SVCP), New York Stock Exchange, approximately $30.00 per share	60,750.00	
40 shares of Phelps Dodge Corporation, New York Stock Exchange, $25.75 per share	1,030.00	
31 shares of General Motors Corporation, $80.00 per share	2,480.00	
9,494 shares of Prudential-Bache Securities, Inc., tax free municipal bonds	113,645.00	
3,174 shares of Putnam Fund tax free municipal bonds	56,084.00	
2 Westchester County Industrial Development Agency Bonds at $5,000.00	10,000.00	
Total		$277,489.00

Real estate owned -

Residence -

207 Corona Avenue, Pelham, New York	$650,000.00	

Investment real estate -

Apt. 2D, 305 Sixth Avenue, Pelham, New York, 160 shares at $60.00 per share	96,000.00	
Apt. 4F, 305 Sixth Avenue, Pelham, New York, 140 shares at $60.00 per share	84,000.00	
1/6 interest in Pelican Realty Co., 305 Sixth Avenue, Pelham, New York, approximately	20,000.00	
1/3 interest in cooperative apartment 2L, 30 North Broadway, White Plains, New York	$ 20,000.00	
Total		$870,000.00

Other assets -

IRA, Prudential-Bache Securities, Inc., in the name of Richard J. Daronco	$ 12,000.00	
IRA, Prudential-Bache Securities, Inc., in the name of Joan Daronco	10,000.00	
New York State Deferred Compensation Plan	12,500.00	
Vested annuity interest in New York State Retirement System*		
Total		$ 34,500.00

*Richard J. Daronco is presently eligible for a lifetime annuity benefit in the sum of $38,929.00 a year or a one time annuity death benefit if death occurs before electing the annual retirement annuity in the amount of $513,590.00 (New York State Employees Retirement Registration # 0818758-5).

NOTE: Neither the annual annuity nor the lump sum benefit are included as an asset for the purposes of this financial statement.

LIABILITIES

Real estate mortgages payable -

207 Corona Avenue, Pelham, New York, payable to Rose Daronco (mother).........................	$ 16,000.00

III. GENERAL (PUBLIC)

. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

Judges in their roles interpret the law, but they do not make the law. This is left specifically for the legislatures, whether the Congress or State legislature. It is important for Judges who are interpreting laws to look to the legislative intent.

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

As a Judge, it is my firm conviction that the primary function of the judiciary is grievance-resolution, that is, a resolution of the grievances existing between litigants before the Court. It is inappropriate for the judiciary to impose far-reaching or broad orders extending to classes of individuals not before the Court.

(c) A tendency by the judiciary to impose broad affirmative duties upon governments and society;

There are times when Court sanctions are necessary in order to effectuate lawful mandates of the Court, but these mandates must be very precise and specific.

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

Since Federal and State Court calendars are presently overburdened, jurisdictional requirements should be strictly adhered to, including standing and ripeness.

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

While the Court may in a given case have continuing oversight responsibilities (such as jail overcrowding), the judiciary should not act in the manner of an administrator (attempt to manage the jail). Other punitive measures to accomplish intended goals, such as the imposition of substantial fines for failing to comply with lawful Court orders, would appear to be sufficient.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

After practicing law for 12 years, it was my decision to devote the remainder of my professional life in the judicial branch of government. I have served in the State judiciary for almost 15 years and hope to continue in the Federal judiciary.

One of my judicial responsibilities is to insure legal pro bono services in appropriate cases, which I have continuously adhered to.

Rec'd · 2/6/87
RP.

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
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New Orleans, LA 70139

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Columbus, OH 43215

SEVENTH CIRCUIT
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Chicago, IL 60611

EIGHTH CIRCUIT
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P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
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1900 Washington Bldg.
Seattle, WA 98101

Samuel L. Williams
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700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
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Montgomery, AL 36104

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CIRCUIT & FEDERAL
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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: RICHARD J. DARONCO
United States District Court
Southern District of New York

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Richard J. Daronco for appointment as Judge of the United States District Court for the Southern District of New York.

Our Committee is unanimously of the opinion that Judge Daronco is "Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

ICIARY COMMITTEE
MAR 19 PM 3: 15

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

COMMITTEE ON THE JUDICIARY

VICTOR A. KOVNER
CHAIR
30 ROCKEFELLER PLAZA
NEW YORK, 10112-0150
(212) 489-8230

ROBERT D. BALIN
SECRETARY
30 ROCKEFELLER PLAZA
NEW YORK 10112-0150
(212) 489-8230

March 13, 1987

Senator Joseph Biden, Jr.
Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Biden:

I am pleased to inform you that the Committee on the Judiciary of the Association of the Bar of the City of New York has found Richard Daronco APPROVED for appointment as a Judge of the United States District Court for the Southern District of New York.

Very truly yours,

Victor A. Kovner

VAK/mlc

BIOGRAPHY

REENA RAGGI

Birth:	May 11, 1951	Jersey City, New Jersey
Legal Residence:	New York	
Marital Status:	Married	David W. Denton 1 child
Education:	1969 - 1973	Wellesley College B.A. degree
	1973 - 1976	Harvard Law School J.D. degree
	1972 (Spring)	Princeton University
Bar:	1977	New York
Experience:	1976 - 1977	Law Clerk to Hon. Thomas E. Fairchild, United States Court of Appeals, Seventh Circuit
	1977 - 1979	Cahill, Gordon & Reindel Associate
	1979 - 1986	United States Attorney's Office Eastern District of New York
	(1979-1982)	Assistant U. S. Attorney
	(1982-1984)	Chief, Narcotics Section
	(1984-1986)	Chief, Special Prosecutions
	(1986)	Court Appointed U. S. Attorney
	1986 - present	Windels, Marx, Davies & Ives Partner
Office:	51 West 51st Street New York, New York 10019 212 977-9600	
Home:		

To be United States District Judge for the Eastern District of New York

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION

1. Full name (include any former names used).

Reena Raggi

2. Address: List current place of residence and office address(es).

Residence:
123 Pierrepont Street
Apartment 4C
Brooklyn, New York 11201

Office:
Windels, Marx, Davies & Ives
51 West 51st Street
New York, New York 10019

3. Date and Place of Birth:

May 11, 1951
Jersey City, New Jersey

4. Marital Status: (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married: May 14, 1983
Spouse: David W. Denton
Occupation: Executive Assistant U.S. Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York 10007

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

1973-1976	Harvard Law School	J.D. June 17, 1976
1969-1973	Wellesley College	B.A. June 2, 1973
Spring term 1972	Princeton University	(guest student for one term in History Department)
Summer 1972	Fairleigh Dickinson University	(summer art course)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Summer 1973 Summer 1974	Continental Can Co. Inc. 633 Third Avenue N.Y., N.Y.	Summer secretarial job
Summer 1975	Cahill, Gordon & Reindel 80 Pine Street N.Y., N.Y.	Summer law associate
Summer 1976	Paul, Weiss, Rifkind Wharton & Garrison 345 Park Avenue N.Y., N.Y.	Summer law associate
September 1976-September 1977	U.S. Court of Appeals Federal Court House Chicago, Illinois	Law clerk to C.J. Thomas E. Fairchild

September 1977- June 1979	Cahill, Gordon & Reindel 80 Pine Street N.Y., N.Y.	Associate
July 1979- June 1986	U.S. Attorney's Office Eastern District of New York 225 Cadman Plaza East Brooklyn, New York	U.S. Attorney; Assistant U.S. Attorney
July 1986- Present	Windels, Marx, Davies & Ives 51 West 51st Street N.Y., N.Y.	Partner

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- Phi Beta Kappa at Wellesley
- Recipient of Wellesley's Bollard Prize in American Constitutional History
- Senior honors for work in American legal history
- Cum laude degree from Harvard

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the title and dates of any offices which you have held in such groups.

Association of the Bar of the City of New York
Federal Bar Council

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

For the last three years, a member of the parish, St. Stephen of Hungary Church.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

March 29, 1977	Admitted to New York Bar
April 18, 1977	U.S. Court of Appeals Seventh Circuit
April 10, 1979	U.S. Court of Appeals Second Circuit
July 17, 1979	U.S. District Court Southern District of New York
August 16, 1979	U.S. District Court Eastern District of New York

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national

policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"An Independent Right to Freedom of Association," 12 Harv. Civ.R.-Civ.L.Law Rev. 1 (1977).

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. September 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

United States Attorney
Eastern District of New York
Appointed by Board of Judges, Eastern District of New York
to fill interim vacancy.
Served from March - June 1986

Assistant United States Attorney
Eastern District of New York
Hired by then U.S. Attorney Edward R. Korman
Served from July 1979 to March 1986

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Law Clerk to Hon. Thomas E. Fairchild
U.S. Court of Appeals-Seventh Circuit
September 1976-September 1977

2. whether you practiced alone, and if so, the addresses and dates:

No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1986	Windels, Marx, Davies & Ives 51 West 51st Street New York, New York 10019 Partner
1979-1986	United States Attorney's Office Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201
1986	United States Attorney (appointed by United States District Court)
1979-1986	Assistant United States Attorney
1984-1986	Chief, Special Prosecutions
1982-1984	Chief, Narcotics Section
1977-1979	Cahill, Gordon & Reindel 80 Pine Street New York, New York 10005 Associate
1976-1977	Law clerk to Chief Judge Thomas E. Fairchild- U.S. Court of Appeals- Seventh Circuit
1976	Paul, Weiss, Rifkind, Wharton & Garrison 345 Park Avenue New York, New York Summer Associate
1975	Cahill, Gordon & Reindel 80 Pine Street New York, New York Summer Associate

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1986	Civil litigation in state and federal courts
1979-1986	Criminal prosecution in federal court
1977-1979	Civil litigation in state and federal courts
1977	Federal appellate work

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

During my seven years in the United States Attorney's Office, I specialized in federal criminal law. I have represented the United States in matters involving allegations of official corruption, international narcotics trafficking, economic fraud, gun trafficking and organized crime activities. I have drafted numerous affidavits in support of arrest warrants, search warrants and orders to permit electronic eavesdropping. I have tried 19 criminal cases and handled any and all appeals resulting therefrom. Since 1982 I have supervised other lawyers representing the United States and participated in policy making regarding the United States' litigation posture in the Eastern District of New York. I have also handled a number of international extraditions where foreign sovereignties' interests in the return of particular individuals to stand trial abroad required representation in federal court.

My civil experience has involved the representation of primarily corporate clients in federal and state litigation. Among the subjects at issue have been Title VII, trademark infringement, breaches of contract and libel and slander.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently.

2. What percentage of these appearances was in:

(a) federal courts;

95%

(b) state courts of record;

5%

3. What percentage of your litigation was:

(a) Civil - 5%

(b) Criminal - 95%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried nineteen federal criminal cases that resulted in jury verdicts. On thirteen I was sole counsel. On six I was chief counsel.

5. What percentage of these trials was:

100% jury trials

Opposing Counsel:

1. Stanley Lupkin, Esq.
2. Jack Litman, Est.
   Litman, Asche, Lupkin & Gioiella
   45 Broadway Atrium-30th Floor
   New York, New York 10006
   (212) 809-4500

2. Case: United States v. Martin Light

Citations: U.S. v. Light, 599 F. Supp. 874 (E.D.N.Y. 1984); aff'd without opinion. Docket No. 84-1073 (2d Cir. 1985).

Summary: Martin Light, an active criminal lawyer, was convicted of heroin trafficking between the Middle East and New York in a ring that involved various former clients. After a sentencing hearing at which evidence was adduced of Light's involvement in or encouragement of other criminal conduct, including murder, obstruction of justice, perjury, cocaine dealing and robbery, the Court imposed the maximum fifteen year sentence. Light had been indicted twice before, in state court for attempted bribery of a police officer and in federal court for bank fraud. He won acquittal both times. After his heroin conviction, Light proffered cooperation to the President's Commission on Organized Crime regarding the role some lawyers play in organized crime families.

Role: I handled all aspects of this case for the United States, from advising federal agents as to the controlled delivery that led to Light's arrest, to presenting the case to the grand jury, trying the case to a jury, presenting evidence at the sentencing hearing, and arguing before the Court of Appeals.

Disposition: Light acquitted on two counts, convicted on third. District Court imposes maximum 15-year sentence. Court of Appeals affirms.

Date of Representation: 1984-85

Court: U.S.D.C.-E.D.N.Y. - Hon. Eugene H. Nickerson
U.S.C.A. - Second Circuit

Opposing Counsel:

Frank A. Lopez
188 Montague Street
Brooklyn, New York
(718) 624-2112

3. Case: United States v. Michele Sindona, et al.
United States v. Rocco Messina, et al.

Citations: U.S. v. Messina, 566 F. Supp. 740 (E.D.N.Y. 1983); Messina v. U.S., 728 F.2d 77 (2d Cir. 1984); Matter of Sindona, 584 F. Supp. 1437 (2d Cir. 1984), affirmed without opinion, Docket No. 84-2172 (2d Cir. 1984).

Summary: These extraditions to Italy involved murder and extortion charges in that country stemming from a campaign of intimidation and terrorism directed against various persons involved in the investigation of Michele Sindona's collapsed financial empire. The most serious and tragic act in furtherance of this campaign was the murder of Giorgio Ambrosoli outside his home in Milan on the very day he had given a deposition for the Southern District of New York against Sindona. Attorney General William French Smith gave Italian authorities his personal assurance of U.S. cooperation in this case.

A successful extradition requires the foreign country to produce evidence sufficient to establish probable cause to believe the accused committed the crimes for which extradition is sought. This was a difficult concept for many in the Italian government to understand. They saw the Fourth Amendment probable cause requirement as an insult to their own legal system. After numerous discussions on this point and months of close joint investigative work, sufficient evidence was adduced to obtain successful extradition rulings in the U.S. courts.

Role: I worked closely with Italian authorities to develop evidence sufficient to support extradition requests for five individuals. I represented the government at the extradition hearings in district court and argued before the Court of Appeals. I drafted the United States brief on appeal as well as various memoranda of law for the district court.

Disposition: Rocco Messina, Charles Arico, Robert Venetucci and Michele Sindona were all ordered extradited by the district court. The case was dismissed against William Arico after his death in an escape attempt from the Metropolitan Correction Center. The Court of Appeals affirmed as to Messina, Arico and Venetucci. Sindona chose not to appeal.

Date of Representation: 1983-1984

Court: U.S.D.C.-E.D.N.Y.- Hon. I. Leo Glasser
U.S.C.A.-Second Circuit

Co-Counsel: Victor J. Rocco, Esq.*
Botein, Hays & Sklar
200 Park Avenue
New York, New York
(212) 867-5500

Opposing Counsel:

1. Andrew J. Maloney, Esq.
U. S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 330-7060
(For Michele Sindona)

2. Roy M. Cohn, Esq. (now deceased)
39 E. 68th Street
New York, New York
(212) 472-1400
(For Michele Sindona)

3. Robert J. Costello, Esq.
1 Penn Plaza
New York, New York
(212) 868-3070
(For Michele Sindona)

4. Jeffrey Weisenfeld, Esq.
Paul A. Goldberger, Esq.
401 Broadway
New York, New York
(212) 925-8640
(For Robert Venetucci)

5. Louis M. Freeman, Esq.
233 Broadway
New York, New York
(212) 608-0808
(For William Arico and Charles Arico)

6. Kenneth A. Reiver, Esq.
123 Grove Avenue
Cedarhurst, New York
(516) 374-0808
(For Rocco Messina)

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* Although not co-counsel at the extradition hearings, Mr. Rocco was extensively involved in the investigation phase of the case.

4. Case: United States v. Mohammed Khan

Citations: Affirmed without opinion, docket no. 84-1118 (2d Cir. 1984).

Summary: This case involved the importation of a significant quantity of heroin from India. The actual courier of the heroin pleaded guilty, but refused to follow a court order requiring him to testify as to whom he was working for. The government put on a circumstantial case that the ringleader was in fact Mohammed Khan. The dramatic increase in the quantity and quality of heroin entering New York from the Indian subcontinent made vigorous prosecution important.

Role: As Chief of Narcotics, I took over the case for trial when the Assistant U.S. Attorney in my unit to whom the case was originally assigned found herself committed to two trials the same date. In addition to trying the case, I drafted the United States brief on appeal and argued before the Court of Appeals.

Disposition: Khan was convicted by a jury on all counts. The Court of Appeals affirmed.

Date of Representation: 1983-1984

Court: U.S.D.C.-E.D.N.Y. - Hon. Charles P. Sifton
U.S.C.A.-Second Circuit

Opposing Counsel: Marion Seltzer
225 Broadway
New York, New York
(212) 608-8890

5. Case: United States v. Fortunato Inzone

Citation: Affirmed without opinion, docket no. (2d Cir. 1984).

Summary: In 1979, a multi-kilogram shipment of heroin was discovered concealed in baby powder containers at the Alitalia cargo facility at John F. Kennedy Airport. Months of investigation exposed a ring of organized crime linked importers who had re-established a Palermo, Sicily to New York connection. Inzone was one of these importers. He fled shortly after Indictment and thus was tried only after several years as a fugitive.

Role: I tried the case to a jury, drafted the United States brief on appeal and argued before the Court of Appeals.

Disposition: Inzone was found guilty on all counts and sentenced to fifteen years incarceration. The Court of Appeals affirmed.

Date of Representation: 1983

Court: U.S.D.C.-E.D.N.Y. - Hon. Edward R. Neaher
U.S.C.A.-Second Circuit

Co-Counsel:

Mark A. Summers, Esq.*
Hoffman, Pollack & Gasthalter
477 Madison Avenue
New York, New York
(212) 688-7788

Opposing Counsel:

Michael Querques, Esq.
433 Center Street
Orange, New Jersey
(201) 673-1400

6. Case: United States v. Frederick W. Richmond

Citation: In re Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982, 561 F. Supp. 1247 (E.D.N.Y. 1982). See also Docket No. 82-8092 (2d Cir.)

Summary: Congressman Frederick W. Richmond, who represented Brooklyn's 14th Congressional District was investigated in connection with a series of criminal allegations, many of which related directly to use of his office. For example, Richmond was alleged to have continued to run his former corporation in violation of House rules and to have made perjurious statements to the contrary on

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* Although not co-counsel at trial Mr. Summers had developed much of the evidence in the case and had tried other defendants charged in the Indictment.

Congressional documents. He was alleged to have paid a naval employee in exchange for assistance with Brooklyn Navy Yard projects. He purportedly used his staff members to obtain drugs for him. He was believed to have obtained employment on the House payroll for an escaped felon under an assumed name.

Role: My role on the investigative team of three lawyers who pursued the case for the U.S. Attorney was to respond to all written motions in the hard-fought grand jury phase of the case. I drafted numerous memoranda and briefs for the district court and Court of Appeals and argued orally on behalf of the United States.

Disposition: Richmond raised various privileges to avoid compliance with grand jury subpoenas, including the attorney-client privilege, the privilege against self-incrimination and the Speech and Debate Clause. He lost all such arguments. One appeal was still pending before the Court when Richmond pleaded guilty to a three count Indictment and resigned his office.

Date of Representation: 1982

Court: U.S.D.C. - E.D.N.Y. - Hon. Jack B. Weinstein
Hon. Joseph R. McLaughlin
U.S.C.A. - Second Circuit

Co-Counsel:

Francis Murray, Esq.
140 Cedar Street
New York, New York
(212) 391-1100

Hon. Max Sayah
Criminal Court
100 Centre Street
New York, New York
(212) 374-6216

Opposing Counsel:

1. Kalman V. Gallop, Esq.
2. Samuel Dawson, Esq.
   305 Madison Avenue
   New York, New York 10165
   (212) 922-1080

7. Case: United States v. Vincent Beltempo, et al.

Citations: U.S. v. Beltempo, 675 F.2d 472 (2d Cir. 1982);
Walberg v. U.S., 763 F.2d 143 (2d Cir. 1985).

Summary: This case involved an organized crime linked heroin importation ring which operated between Sicily and New York and which between January and February, 1981 imported over 40 pounds of heroin through John F. Kennedy Airport. A courier for the group exposed its members, the scope of the operation and the importation techniques used. Involved were a number of individuals who had long been suspected as major narcotics violators but who had previously avoided prosecution. Travel records and Swiss banking documents were important evidence in proving the defendant's guilt.

Role: I handled this case from its inception, presenting evidence to the grand jury, trying the case to a jury, drafting memoranda and briefs for the district court and Court of Appeals.

Disposition: Three of the four defendants tried were found guilty on all counts. One was acquitted. A number of others entered guilty pleas. The Court of Appeals affirmed all convictions.

Date of Representation: 1981-1982

Court: U.S.D.C.-E.D.N.Y. - Hon. Jacob Mishler
U.S.C.A.-Second Circuit

Co-Counsel: Richard Appleby, Esq.

Opposing Counsel:

1. Gustave H. Newman, Esq.
641 Lexington Avenue
New York, New York
(212) 308-7900
(for Vincent Beltempo)

2. Ivan S. Fisher, Esq.
442 E. 58th Street
New York, New York
(212) 288-0010
(for Barbara Walberg)

3. James A. Druker, Esq.
1325 Franklin Avenue
Garden City, New York
(516) 746-4300
(for Giuseppe Gallina)

4. Emanuel Moore, Esq.
168 Canal Street
New York, New York
(212) 226-1260
(for Giuseppe Aiello)

8. Case: United States v. Angelo Randazzo, et al.

Citation: Affirmed without opinion, docket no. 82-1002
(2d Cir. 1982)

Summary: Angelo Randazzo was an organized crime linked heroin importer who had been convicted in the 1970's for orchestrating the transportation of heroin from Sicily to New York. He was given early parole because of his own and his child's poor health. Within weeks of his release, he devised the scheme to get back in the heroin business through a connection in the Orient. His involvement would very likely have been impossible to prove but for admissions he made to a courier who consensually recorded the conversation.

Role: I handled the case from its inception, presenting evidence to the grand jury, trying the case to a jury, drafting memoranda and briefs for the district court and Court of Appeals.

Disposition: The two defendants who went to trial were convicted on all counts. A third pleaded guilty. Randazzo was sentenced to twenty-five years incarceration. The Court of Appeals affirmed.

Date of Representation: 1981-1982

Court: U.S.D.C.-E.D.N.Y.- Hon. Mark A. Costantino
U.S.C.A.- Second Circuit

Opposing Counsel:

1. John Iannuzzi, Esq.
233 Broadway
New York, New York
(212) 227-9595

2. Michael Pollack, Esq.
1370 Avenue of the Americas
New York, New York
(212) 888-3400

9. Case: United States v. Monta Bigelow

Citation: District Court Docket No. 81 CR 412

Summary: Ms. Bigelow was the Thai connection for massive amounts of high quality heroin imported into the United States by a Dutch/German ring. At trial she tried to limit her involvement with the group to her dealings with them as a prostitute and social acquaintance. Indeed, she appeared every day at trial in a form fitting red silk Oriental style gown. Detailed travel itineraries were important evidence in establishing her more significant role.

Role: I tried this case to a jury. The defendant did not appeal her conviction.

Disposition: The defendant was convicted on all counts.

Date of Representation: 1981

Court: U.S.D.C.-E.D.N.Y. - Hon. Thomas C. Platt

Opposing Counsel:

John Corbett, Esq.
50 Court Street
Brooklyn, New York 11201
(718) 875-1975

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts required in this question, please omit any information protected by attorney-client privilege.)

During the years I served in the U.S. Attorney's Office, among the most significant legal work I did, apart from representation of the government at trial, involved (1) the exercise of prosecutional discretion in instituting or declining criminal prosecutions; (2) the supervision of long term criminal investigations and (3) the encouragement of cooperative international law enforcement efforts.

Certainly, as important to the due administration of justice as the vigorous prosecution of certain cases is the responsible declination of others where there are substantial questions as to the existence of probable cause. I, therefore, consider some of my most important legal work as U.S. Attorney or as Chief of various units to have involved the careful review of literally hundreds of cases presented for possible federal prosecution.

In supervising long-term criminal investigation, it was my responsibility to advise and direct junior attorneys in the office as well as agents of various law enforcement entities as to their legal ability to pursue various techniques in gathering evidence. It was particularly important to let agents know that such advice was available to them at any time, whether at 2:00 A.M. or 2:00 P.M.

Among the more innovative techniques I helped devise was the concept of electronically monitoring moving cargo. For many years, law enforcement authorities had been frustrated by the fact that when narcotics were discovered in a cargo shipment, they were rarely able to arrest anyone other than the low-level individual sent to pick it up. It was simply too risky to let the contraband-laden cargo leave government control. Accordingly, we came up with the idea of wiring the cargo itself so that when it was allowed to move in the importation chain we could intercept the incriminating conversations of all persons with an interest therein. In addition to the obvious technical challenge posed, the U.S. Attorney's office had to deal with such legal questions as how to define the "area" where interceptions would take place given that this area would constantly be changing as the cargo moved; what judge or judges to have sign the interception order given the close proximity of five districts in four states in the New York area into which the cargo could move; and, finally, how to get Department of Justice approval for the interception in the short time we would have physical control of the cargo. These issues were all resolved such that this technique is now an invaluable law enforcement tool.

More recently, as U.S. Attorney, I supervised a broad investigation into alleged corruption in New York City's Taxi and Limousine Commission. The investigation moved very quickly such that within three months, an indictment was returned charging the head of the Commission with a multi-million dollar fraud in connection with electronic taxi meters in City cabs, fraudulent obtaining of personal loans from a credit union involved in the meters scheme, and income tax violations.

In the course of this investigation it was unexpectedly discovered that officers of the credit union involved in the meter scheme had engaged in a broad spectrum of fraud jeopardizing over $20 million in depositors' assets. While from a purely investigative perspective it might have been desirable to let the corrupt credit union officials continue to run the financial institution, thus better to obtain evidence of wrongdoing, it was my ultimate decision that this would irresponsibly jeopardize depositors' savings. Accordingly, with the cooperation of state authorities, we were able to close and reorganize the credit union within 36 hours of learning the scope of the fraud. Before I left office as U.S. Attorney two bank officers and their attorney pleaded guilty to multiple counts of fraud and agreed to make restitution.

Since so much of the work in the Eastern District of New York is international, by reason of the district's position as the virtual port of New York, a significant effort was made over the years by myself and other attorneys in the office to further cooperative efforts between our country and foreign governments. Toward this end I met frequently with foreign counterparts to discuss similarities and differences in our legal systems. Most recently, in the spring of 1985 I was asked by the Justice Department to speak at a conference of U.S. and Italian officials on extradition law in the hope that the then-recently successful extradition of Michele Sindon from the U.S. to Italy, which I participated in, could be a model for the future.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

None, other than as described in question 5, infra.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I expect to resolve any conflict of interest by adhering strictly to the provisions of 28 U.S.C. § 455. Any questions as to whether there is or is not a conflict in a particular matter will be resolved in favor of disqualification. I do not anticipate any real or apparent conflict that would not be covered by this statute.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, the dates of the campaign, your title and responsibilites.

   No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Since I have been a member of my firm for a relatively short time -- commencing in July 1986 -- terminating my relationship can be accomplished in a straightforward manner.

   a. At the end of the calendar year in which I leave the firm, the Partnership's Executive Committee will distribute the year's net profits among the partners. This should cover any compensation for work on pending litigation.

   As to any share assigned me, there will be charged against this amount the monies received as "monthly draws" for the time I was with the firm. If my year end share exceeds the total monthly draw I would expect to receive a check in this amount. If the share were to be less than the monthly draws, I would owe the firm this amount. I would not be entitled to any partnership profits for years after my leaving the firm.

   b. When I leave the firm I will withdraw any contributions to capital made by me to the partnership. Thus far I have made none. At ther end of 1986, I expect I will make a contribution in the amount of 3% of my profit share for that year.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

REENA RAGGI
and
DAVID W. DENTON

As of October 6, 1986

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	11,923		
U.S. Government securities—add schedule	*		
Listed securities—add schedule	18,164		
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	305,000		
Real estate mortgages receivable			
Autos and other personal property	28,000		
Cash value—life insurance			
Other assets—itemize:			
IRA Accounts (Reena)	18,102		
IRA Accounts (David)	15,553		
Civ.Serv.Retirement(Reena)	22,350		
Civ.Serv.Retirement(David)	29,969		
Total assets	449,040		

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	244,000		
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	244,000		
Net worth	205,040		
Total liabilities and net worth	449,040		

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	Yes**		
Are you defendant in any suits or legal actions?	No.		
Have you ever taken bankruptcy?	No		

*Treasury zeroes are listed under IRA Accounts (Reena) and on attcvhed schedule.

**Shares of co-operative apartment corporation are pledged to secure mortgage listed above.

REENA RAGGI AND DAVID W. DENTON
FINANCIAL STATEMENT AS OF OCTOBER 6, 1986

ASSETS

	Current Value
BANK ACCOUNTS (CITIBANK, N.A.):	
Checking Acct.	471
Savings Acct.	469
Insured Market Rate Acct.	7,774
Landmark NY TaxFree Acct.	3,209
TOTAL BANK ACCOUNTS =	11,923
STOCKS:	
100 Detroit Edison $4.00 Preferred	3,013
578 Detroit Edison Common	9,537
279 Detroit Edison Common (David, Jr.)	4,604
TOTAL STOCKS=	17,154
MUTUAL FUNDS:	
64.863 Dreyfus NY Tax Exempt Fund	1,010
TOTAL MUTUAL FUNDS =	1,010

RETIREMENT FUNDS:	
Civil Service Retirement Fund (Reena)	22,350
Civil Service Retirement Fund (David)	29.969
TOTAL RETIREMENT FUNDS =	52,319
I.R.A. ACCOUNTS (REENA):	
Hudson City Savings C.D.	9,005
27 U.S. Treasury Zero Coupon Bonds	6,899
Charles Schwab - Money Mkt. Acct.	2,198
I.R.A. ACCOUNTS (DAVID):	
66.662 Fidelity Magellan Fund	3.324
81.468 Fidelity Overseas Fund	2,430
262.952 Lindner Fund	4.496
38.712 Mutual Shares Fund	2.496
81.723 20th Century Select Fund	2.783
Charles Schwab - Money Mkt. Acct.	3
TOTAL IRA ACCOUNTS =	33.634
REAL ESTATE:	
Co-operative Apartment (Residence) (Valued at cost)	305,000
OTHER:	
1986 Toyota Camry	11.000
1964 Porsche	7.000
Furniture & Personal Property	10,000
TOTAL OTHER =	28.000
TOTAL ASSETS =	449,040

LIABILITIES

Mortgage on Co-operative Apartment	(244.000)
TOTAL LIABILITIES =	(244.000)
NET WORTH =	205.040

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" has been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-solution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The proper role of the federal judiciary, and criticism of "judicial activism" must be considered in light of two principles important to our Republic: (1) we are a free people committed to the ideals of individual liberty and justice under the law; (2) we are a democracy where public servants are only representatives of the people and, accordingly, periodically accountable to them through the electoral process.

There is an obvious tension between these principles when applied to the judiciary. On the one hand, the federal courts play a critical role in safeguarding liberty and equality. It is to the judiciary, more easily often times than to the executive or legislative branches of government, that a single individual can turn for redress of particular wrongs in this area. On the other hand, because the members of the judiciary are appointed for life and are not subject to electoral review, they do not mirror as effectively as the other branches of government the social, economic and political priorities of the populace. Indeed, history amply demonstrates that for every occasion when the courts have pushed society closer to some ideal, e.g. Brown v. Board of Education, 347 U.S. 483 (1954), there are other occasions when it has been the judiciary that has curbed such instincts. e.g. Plessy v. Ferguson 163 U.S. 537 (1896).

Mindful of its own limitations, and recognizing that the only real source of its power is public respect, the judiciary has traditionally limited itself in the exercise of its role. This is appropriate. It is important that the judiciary continue to limit itself to hearing cases in which the real parties in interest present particular grievances ripe for resolution. Moreover, such remedies as may be appropriate in particular cases should be fashioned to insure a just result with a minimum intrusion into areas more appropriately administered by others.

"Judicial activism" is inappropriate in those broad and controversial areas of social policy which are the proper province of the democratically-elected branches. Only by the process of broad debate and compromise that characterizes the decision making of these branches can the public's will be served.

It is a too hasty intrusion into these social policy areas that provokes criticism of the judiciary and can undermine its ability vigorously to carry out its most important role: the preservation of liberties fundamental to the democratic process. The Constitution explicitly safeguards these liberties against shifting majority views. Thus, it is proper, and indeed vital, that the Courts ensure rights such as speech, debate and press. Indeed, by thus guaranteeing that each person has an equal right to have his or her views heard, the Courts -- the least democratic branch -- promote the democratic ideal that encourages those holding minority views to work through the process and gain majority support. It is not then for the judiciary to choose from among competing views and ideas the one to which society must adhere. But it is critical to the free and democratic operation of our society that the judiciary safeguard those constitutional rights which demand a free marketplace for the ideas of all.

Serious threats to these fundamental rights may require far reaching and uncompromising remedies. But for these remedies to be respected and observed the judiciary cannot resort to them routinely in matters not involving fundamental freedoms.

To deal more specifically with criticisms of "judicial activism" is impossible without reference to a particular case. This in itself may reflect restraint and an awareness that the judiciary can rarely deal effectively with abstractions. It is designed to work with real people posing real and immediate problems defined by relevant witnesses and documents presented directly to a factfinder. In this way it serves its proper role within the Constitutional balance.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

Most of my professional career has been spent in public service. I have always viewed this work as a commitment to providing an open and just government to all people. Certainly in the multi-racial, multi-ethnic, economically diverse community that is the Eastern District of New York, any government official who sought to perform his or her duties responsibly would have to be committed to equal justice under law. Moreover, I can state unqualifiedly that in my personal, as well as professional life, I deplore discrimination of any kind. Perhaps because my ethnic background and sex still are viewed prejudicially by some persons, I am sensitive to others who find themselves judged not on their abilities, but on their race, gender, religion or country of origin.

As an Assistant U.S. Attorney and, more recently, as United States Attorney, my commitment to equal justice has meant that my prosecutorial decisions were made purely on merit, without bias against, fear of or favoritism toward any group. If I prosecuted poor Hispanic couriers who brought cocaine into the United States I was equally vigorous in my prosecution of upper class professionals who allowed their businesses to launder drug money. If I sought indictments against black youths who robbed banks, I did not hesitate to obtain indictments against white politicians who, through acts of greed and corruption, robbed the public of its right to good government.

This commitment to equal justice for those allegedly involved in criminal activity was necessarily partnered to a commitment to improve the quality of life throughout the district for all its residents. It was not simply the affluent suburbanites of Long Island's North Shore who were entitled to safe communities in which to raise their families. It was also the elderly and single parents living in transition neighborhoods in Brooklyn and Queens that had this right. Instead, they would increasingly find themselves hostages to the criminal elements that preyed -- often violently -- on their communities. It was to the latter groups that we devoted most of our law enforcement resources. It was about the latter groups that I would frequently speak when I had the opportunity to discuss the district's problems with Congressional and civic leaders.

In seeking an appointment to the federal bench I am, in essence, making a commitment to public service for the rest of my life. Obviously, the role of judge in our legal system is very different from that of prosecutor. The commitment to equal justice for all must, if anything, be even stronger. I am acutely aware of the fact that, by the very words of the judicial oath, I would be swearing "to administer justice without respect to persons, and do equal right to the poor and the rich." (28 U.S.C. § 451). I believe sincerely in these words and would expect to live up to them in the performance of my duties, so that whether litigants agreed or disagreed with my rulings, they would at least feel they had had a fair hearing of their side.

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October 3, 1986

CONFIDENTIAL

The Honorable Strom Thurmond
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: REENA RAGGI
United States District Court
Eastern District of New York

Dear Senator Thurmond:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Reena Raggi for appointment as Judge of the United States District Court for the Eastern District of New York.

A substantial majority of our Committee is of the opinion that Ms. Raggi is "Qualified" for this appointment. The minority found her to be not qualified.

Sincerely,

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

STANDING COMMITTEE ON FEDERAL JUDICIARY
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COMMITTEE ON THE JUDICIARY

RECEIVED MAR - [illegible] 1987

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October 9, 1986

Senator Strom Thurmond
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I am pleased to inform you that the Committee on the Judiciary of the Association of the Bar of the City of New York has found Reena Raggi **APPROVED** for appointment as a Judge of the United States District Court for the Eastern District of New York.

Very truly yours,

Victor A. Kovner

VAK/mlc

CONFIRMATION HEARING ON: RONALD S.W. LEW, BOHDAN A. FUTEY, AND WILKES C. ROBINSON

TUESDAY, APRIL 7, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 2:33 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick Leahy (acting chairman) presiding.

Also present: Senators Thurmond and Metzenbaum.

Staff present: Steven J. Metalitz, special counsel; Robert Short, minority chief investigator; Linda Greene, counsel to Senator Metzenbaum; Stephanie Hamlett, nominations clerk.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator Metzenbaum. The committee will come to order. Senator Leahy is on the floor and he will return from the floor shortly, hopefully.

We have three nominees today, Mr. Bohdan Futey, of Cleveland, for the United States Claims Court. I have known Mr. Futey for a number of years. He is now with the Foreign Claims Settlement Commission. He has been a distinguished leader in the ethnic communities of not only Cleveland, but throughout the country.

Though he is not a judge in his present position, his work is of a judicial nature and he has certainly added to his already excellent qualifications for this post. He has a distinguished legal background, having graduated from Cleveland Marshall Law School in Cleveland. He was smart enough to go to the same high school that I went to, which was a very good idea for him to do. From 1968 to 1972, he was a partner in the firm of Futey and Rakowsky.

He has had a distinguished record. The only fault that I can find with his record is he does not seem to be a man of great, good judgment because he has done too much for the President of the United States to help him get elected, but I suppose those things I understand as well. We are happy to have you with us, Mr. Futey.

Senator Wilson is with us today to introduce a candidate, I gather, from California, is that correct?

Senator Wilson. That is correct, Mr. Chairman. He is not from Cleveland. [Laughter.]

Senator Metzenbaum. Well, he did not go to my high school, but we could still consider him anyhow. Why do you not proceed to introduce him?

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Thank you. Mr. Chairman, I have the great privilege today to introduce to the Committee a very distinguished candidate for further service on the bench. He has already distinguished himself by his service on both the municipal court and superior court benches in Los Angeles County, where he resides with his family.

By the way, his family is with him, his lovely wife, Mamie, and their four handsome and very proud children. I would ask that they all stand, if I may.

Senator **Metzenbaum**. Why do you not stand up?

Let me ask that little fellow over there, do you think that your dad ought to be a judge?

Mr. **David Lew**. Yes. [Laughter.]

Senator **Metzenbaum**. You think he will be all right, okay, all right. I assume the rest of the family would agree.

Senator **Wilson**. They agree, they heartily agree. In fact, if you were to poll them, I think you might find that they have a very keen interest beyond the personal interest that you would expect. They have the distinction, all four of these youngsters, of having indicated already at this tender age that they desire a career for themselves in the law. In fact, the young man of whom you made inquiry, David, would just as soon dispense with the part about being a lawyer; he would like to be a judge just as soon as possible. [Laughter.]

Senator **Metzenbaum**. None of you would have the bad judgment to think of running for Senator Wilson's position, would you? [Laughter.]

Senator **Wilson**. I will need relief long before I think they are ready for that, Mr. Chairman.

Well, Mr. Chairman, let me just say to you that there is a happy problem that is faced by those who have to nominate people for this judicial district, and the problem is the right one to have. It is a difficult choice among very talented people.

Judge Lew, on the basis of his record and his reputation within the community—the community at large as well as the legal community—has enjoyed the highest reputation both for skill and competence and for character and integrity, and indeed has received from a judicial screening committee that serves me in making these recommendations to the President the highest rating they can give, that of extremely well qualified.

He has begun his career in the Los Angeles City Attorney's Office, handling both criminal and civil cases after graduating from Loyola University in Los Angeles where he received his bachelor's degree, and then went on and took his doctor of jurisprudence degree from Southwestern University, taking out two years along the way to serve as a first lieutenant in the United States Army.

After his service in the City Attorney's Office, he formed a law firm of his own and, for eight years, distinguished himself in private practice. During this time, he also found the opportunity to serve his city in the capacity of being a commissioner on the Los

Angeles City Fire and Police Pension Board, for which service he has been recognized by the city and also by the fire service, receiving a distinguished service award.

He has been recognized by Governor Brown with appointment to the bench. His service includes both municipal and superior court experience. He is regarded as a particularly fair and competent trial judge.

The opportunity now to perform on the federal district court bench is one that he looks forward to. However, I must say that many of us have been at least as eager as he to have him serve in this capacity.

I could go on at much greater length. We have appended to his record, and I believe the Committee is in receipt, of a page of awards that he has received both for his service to his community in a variety of capacities as well as serving with distinction as a judge.

Rather than taking more of the Committee's time, I would simply submit his record. I think it speaks eloquently for itself. Again, in the course of being privileged to make these recommendations to the President, I have seldom encountered the degree of community support, the warm, enthusiastic support, that I have in the case of Judge Lew.

Senator **Metzenbaum**. Thank you.

I am not going to conduct this hearing. I think Senator Leahy will be able to get here. I did want to make it possible for those who are presenting the candidates to make their introductions.

We appreciate your introduction, Senator Wilson, and we appreciate your being with us, Judge Lew. If you would just stand by, Judge Lew, I do not know whether Senator Wilson will be able to remain, but I think Senator Leahy may have some questions for you.

Thank you very much.

Senator **Wilson**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Mr. Futey, would you like to introduce Mrs. Futey, who I think is there with you?

Mr. **Futey**. Yes, Senator, definitely. I might just say for the record that we really enjoyed the communication and the contact we had with Senator Metzenbaum. Senator, I promise you that if there is no Republican running in Ohio, I will definitely consider Metzenbaum for that office.

Senator **Metzenbaum**. That is great. I have a wonderful chance. [Laughter.]

Mr. **Futey**. I am honored to appear before you, especially at a meeting that you are chairing, and to introduce my wife, Myra Futey, and my three children: Andrew, who is a junior at George Washington University here in Washington. By the way, he wants to be an attorney, also, and probably follow in his father's footsteps.

Senator **Metzenbaum**. He does not intend to run for the Senate soon, does he?

Mr. **Futey**. Not at this time.

Senator **Metzenbaum**. Okay, all right.

Mr. **Futey**. And my daughter, Lidia, who is a freshman at John Carroll University. That is your neighborhood, Senator.

Senator **Metzenbaum**. Yes, it is.

Mr. **Futey**. And my youngest one, Daria, who is a senior in high school yet and will be graduating this year and plans to go to law school in the near future.

Thank you.

Senator **Metzenbaum**. We are very happy to have the families of all of the nominees with us. It provides a certain warmth to these hearings and we are just delighted to welcome you.

We are also delighted to welcome Senator Nancy Kassebaum, and I would say to my distinguished colleague who is here to introduce Mr. Wilkes Robinson, a nominee for the U.S. Claims Court, that I am due to speak over in the Cannon Building in about four minutes. So I know that the Senator from Kansas has always been superb and eloquent, but also very concise.

STATEMENT OF HON. NANCY LANDON KASSEBAUM, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator **Kassebaum**. And brief.

Thank you very much, Senator Metzenbaum, and it is just a great pleasure for me to be here to introduce Wilkes Robinson today for the United States Claims Court. Though born in Alabama, we like to claim him now in Kansas and are proud to do so.

A graduate of the University of Virginia Law School, he is someone who has served both the public as well as the corporate world in his distinguished career in the law. I think the work that Mr. Robinson has done in pro bono work as well as corporate speaks to his understanding and his diversity and interest.

It is a great pleasure for me to be here with him and with Mrs. Robinson today in presenting him to you.

Senator **Metzenbaum**. Is your family here?

Senator **Kassebaum**. Julia Robinson is here as well.

Senator **Metzenbaum**. We are very happy to welcome you here, Mrs. Robinson. It is nice to have you here with us.

Senator **Kassebaum**. Senator Dole, I know, joins me in this. He was going to be coming, but I am not sure whether he is going to be able to get here, of course, at this time.

Senator **Metzenbaum**. We do have his statement and we will enter it into the record at this point, along with a statement of Senator Leahy.

[Statements follow:]

Opening Statement of Senator Bob Dole

Mr. Chairman: It is with more than a little Kansas pride that I come today to introduce and support Wilkes C. Robinson of Overland Park, Kansas, to be a judge of the U.S. Claims Court. He brings before this committee for review and I hope approval a diverse set of experience and credentials that qualify him for service.

As a former member of this committee and past chairman of its Courts Subcommittee, I feel I can speak with some authority since this court came into existence under the provisions of the Omnibus Judgeship Act of 1982, which was considered during my time as chairman.

The Claims Court is a specialized court—with obvious jurisdiction over claims against the Government. Many of these disputes involve very complex issues with much money at stake. The court also is a major arbitrator in Government contract disputes and tax matters. It needs men and women of broad experience and expertise yet specialized expertise to handle its heavy workload.

I am convinced that Mr. Robinson possesses such credentials. A Phi Beta Kappa from University of Alabama and a high ranked graduate of University of Virginia Law School, he has served as a judge in the Alabama courts, a corporate counsel, and most recently, for the past seven years as president and board member of the Gulf & Great Plains Legal foundation, which is headquartered in Kansas City.

This indeed is a diverse and varied background, and one which will serve him in good stead when addressing the wide range of legal matters coming before the court.

I will not dwell further on his background, for I know that the committee and its staff have done their homework and have given this nominee a thorough review. This inquiry, of course, is in addition to the scrutiny already given by the Department of Justice and White House.

Mr. Chairman, I appreciate the courtesy shown in the prompt consideration of this nominee. It is important to me and my State, but it is also important that the claims court be fully staffed so as to be able to process its caseload in the most effective manner.

Thanks very much and good luck to Wilkes Robinson and his family.

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Today's hearing is the third held in this Congress by the Judiciary Committee to consider nominations to the federal courts. On the agenda this afternoon is one District Court nomination, that of Judge Ronald S.W. Lew to be a judge of the Central District of California. We will also hear from two nominees to the U.S. Claims Court: Wilkes C. Robinson and Bohdan A. Futey. The third Claims Court nominee scheduled for this hearing, Roger B. Andewelt, is ill, and his hearing will be rescheduled at a later time.

The Claims Court is established under Article I of the Constitution, rather than Article III. It has a restricted jurisdiction, and its judges serve fixed terms. But these nominations are nonetheless extremely important, and require careful scrutiny by the Judiciary Committee.

The Claims Court has a unique mandate. In virtually every case it hears, a citizen is seeking redress against the federal government. Because Claims Court judges do not enjoy the guarantee of independence that accompanies life tenure on the bench, the Judiciary Committee must take particualr care to be sure that Claims Court nominees have the character and temperament that will enable them to do equal justice in resolving tax, contract, and other disputes between the federal government and the American people.

The Claims Court is not the farm team for the Article III courts. Instead, it is the forum to which citizens aggrieved by lawless acts or omissions of the federal government must turn, in many cases, for compensation. Claims Court judges have a particularly weighty responsibility, for cases in that court are submitted, not to the common sense of a jury of the litigants' peers, but to a single judge alone. Consequently, in that court, no less than in the Article III courts, we must be sure that the judges we confirm will hold the balance true between citizens and their government.

As we customarily do, we will hear first from several Senators who wish to introduce nominees to the Committee. Before we turn to the Senators, let me note for the record that each nominee before the Committee today has completed and extensive questionnaire on his qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing. We will also keep the record open for a limited time for follow-up questions to the nominees, and for additional questions that may be submitted by members of the Committee who are unable to be present this afternoon. We will also include in the record the full introductory statements of home-state Senators.

Senator METZENBAUM. We certainly appreciate it, and your recommendation of Mr. Robinson certainly goes a long way with us.

I am going to recess this hearing and we are going to check with Senator Leahy as to whether he thinks he will be able to get back or whether it is his wish that staff proceed with some of the questions that he had intended asking.

Suffice it to say that we appreciate you, Senator Kassebaum, being here, and we appreciated Senator Wilson. I would say to the judicial nominees that your patience will be probably adequately rewarded when we get around to confirming you, so if you will just stand by for a little bit, I cannot tell you whether it will be 15 minutes or an hour or what the procedure will be. But thank you for being with us and please be good enough to stand by.

We stand recessed.

[Recess.]

Senator **Thurmond** [presiding]. Judge Lew, have you been sworn yet?

Judge **Lew**. No, I have not.

Senator **Thurmond**. What about the other two?

Mr. **Short**. No, sir.

Senator **Thurmond**. If all of the nominees will stand up and be sworn at one time, will the evidence you give in this hearing be the truth, the whole truth and nothing but the truth, so help you God?

Judge **Lew**. I do.

Mr. **Robinson**. I do.

Mr. **Futey**. I do.

Senator **Thurmond**. Have a seat.

Senator Leahy has some questions here and he could not be here. I will propound the questions.

Judge Lew, it appears that you have had very little experience in federal court. According to your questionnaire responses, only about one percent of your court appearances while you were in private practice were in federal court.

Of course, for the last five years you have been fully occupied with your duties as a State court judge. Are you a State court judge or municipal court judge?

TESTIMONY OF HON. RONALD S.W. LEW, OF LOS ANGELES, CA, TO BE U.S. DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Judge **Lew**. For the last five years, with equal time, I have been in the municipal court and with the superior court, which is a county court of general jurisdiction.

Senator **Thurmond**. In other words, you were a municipal judge 1982 to 1984, I believe.

Judge **Lew**. That is correct, Mr. Chairman.

Senator **Thurmond**. And a State court judge from 1984 to the present?

Judge **Lew**. Well, I would deem all of it to be a State court judge. We are paid through the State, but the division of work is one of city jurisdiction in municipal court for two-and-a-half years and a county jurisdiction for the other two-and-a-half years.

Senator **Thurmond**. What is the most significant challenge you face in moving from the State courts to the federal bench, and how do you plan to meet this challenge?

Judge **Lew**. Well, I did not have to move. I would imagine it would be relearning new procedures for the federal practice. Other than that, I do not expect that the challenge is one that I cannot overcome.

Senator **Thurmond**. The Central District of California is one of the busiest federal courts in the nation. During the most recent year for which figures are available, it concluded almost 9,200 civil cases, more than any other district court in the country except for the Southern District of New York.

How do you plan to cope with this extraordinary caseload while still maintaining the quality of justice?

Judge Lew. Simply put, to work hard. We are——

Senator Thurmond. Are you willing to work longer hours and work harder to do it?

Judge Lew. I do not know if you are aware, Mr. Chairman, that in the Central District of California, with the ever-burgeoning load of work with the Central District, the courts have had to work very long hours. It is not uncommon to start at 8:00 and finish at 6:00 or 7:00 at night.

Some courts have even convened on Saturdays to cope with the workload. I expect that I will work just as hard as the others.

Senator Thurmond. The docket of the Central District of California also has an unusually high concentration of cases arising under federal law which have no close counterpart in the State courts.

For example, in the most recent year for which we have figures, it concluded 595 cases in the field of copyrights, patents and trademarks, more than any other district court in the country. It is also second in the country in the number of labor law cases concluded.

How do you plan to prepare to handle these federal law cases which you have not encountered previously in your career?

Judge Lew. I think that in the field of legal work as a lawyer or transitioning to a State court position or even going to a federal court position, one obviously always encounters new areas of law they are not quite familiar with, and the only way to overcome it is through study.

Senator Thurmond. In your career as a trial judge, you have not had much opportunity to issue written decisions. My impression is that federal trial judges are called upon to write more opinions than some of their counterparts in State courts.

Are you confident of your ability to express yourself clearly and concisely in writing these opinions?

Judge Lew. I am. In the State court as well as in legal practice, one must write many opinions. However, as the Committee will note, I have supplied to them those written opinions that I wrote when I served pro tem with the court of appeal in the State of California.

Senator Thurmond. In California, some of these courts are notorious for protracted criminal trials, some taking more than a year. Federal criminal trials are generally concluded much more promptly.

A most recent report for the year ending June 30th, 1985, shows that the longest criminal trial in the federal courts took place in the court to which you have been nominated—the DeLorean trial, which took 84 court days.

As a judge of the superior court in California, you have presided over some rather protracted trials, I believe. Some of the criminal trials, in particular, have lasted two or three months, is that correct?

Judge Lew. That certainly is correct.

Senator THURMOND. Such protracted trials are quite unusual in the federal courts. Are they typical of the State courts in California?

Judge LEW. Well, one of the reasons why the trials are protracted is because of a provision where the attorneys are able to voir dire the jury and it is not uncommon for voir diring a jury to occur from a month to even a year in one—not a year, but several months in one case.

I understand that in the federal practice I will not have the attorneys questioning, and I think I am very brief myself and we should empanel juries much quicker. So I do not see the trials to be as protracted as those that I have seen in the State courts.

Senator THURMOND. In the federal courts, voir dire is generally conducted by the trial judge, though the court may permit the lawyers to question potential jurors. How do you plan to conduct jury selection in your court if you are confirmed as a federal judge?

Judge LEW. As I have as a lawyer and as I have in the jury selection process in the State. I am brief and will explore to the degree that will be necessary to empanel a fair and impartial jury. Certainly, I do not anticipate that juries will be selected beyond one hour's time.

Senator THURMOND. You referred in your questionnaire responses to one case, *People* versus *Kenneth Gay,* et al, in which you presided over a preliminary hearing that was expected to take six or seven weeks. You concluded it in eight court days.

How were you able to expedite these proceedings, and how do you think the same techniques for expediting cases will be useful in federal court?

Judge LEW. The application of the techniques that were used in that hearing will be applied to my federal court trials, I would assume, and it is taking very strong control over the lawyers without denying them their right to advocacy.

But because you are taking strong control over the proceedings, you are able to proceed efficiently, and in that manner you can cut the time many times to a quarter of the time that they would project.

Senator THURMOND. Judges try cases, of course, but increasingly they have taken an active role in encouraging their settlement as well. What do you think is the proper role of a judge in encouraging settlements, and have you played this role in the California courts and do you think you have been successful in it?

Judge LEW. I have played that role. I believe in settlements. I have encouraged it and I will continue to do so. I believe it is proper.

Senator THURMOND. Senator Leahy has this question: Every lawyer has a professional obligation to devote part of his or her time to serving the disadvantaged. What specific activities in your professional career best demonstrate how you have fulfilled this responsibility?

Judge LEW. I believe it would be best that I direct you to the responses that I have previously given in writing in the responses to the questionnaire by this Committee. However, let me state for the record at this time that during the time that I did practice as a lawyer, ten percent of my time was devoted to the free or very low, reduced fees.

And while I was in practice, I devoted much of my time to bar association volunteer work, and also that of community-based work that did serve the underprivileged.

Senator **THURMOND**. I want to ask you this question. Judicial activism—do you know what that means?

Judge **LEW**. I have an——

Senator **THURMOND**. Some judges have taken over hospitals, prisons, schools, and other State institutions. I do not think the original idea arose with those who wrote the Constitution.

When they wrote this Constitution, and this is the 200th anniversary year they wrote it, they had in mind preventing any one man getting too much power, and that is the reason they did not establish the English system of parliamentary government or some other system.

They decided to have a Legislative Branch called the Congress to make the law, the Executive Branch headed by the President to administer the law, and the Judicial Branch headed by the Supreme Court to interpret the law.

Some judges have gone beyond the realm and have been activists, so to speak. How do you feel about that?

Judge **LEW**. I would say this, that I believe the office of the judiciary should never be a position where one would advocate their personal positions. It is fortunate that I have been a State court judge for the past 5 years. I can only tell this Committee at this time that I would ply my trade as I have done the last five years as a State court judge; that is, I will pass fair and just rulings only on those issues that are properly before the court.

Senator **THURMOND**. I want to congratulate you on your appointment by President Reagan. I believe he appointed you on the recommendation of Senator Wilson; Senator Cranston has also approved your nomination, I believe. I hope you have a fine career on the bench.

Judge Lew. Thank you, Mr. Chairman.

Senator **THURMOND**. You are now excused.

If Mr. Bohdan Futey will come around, please, have a seat, Mr. Futey.

TESTIMONY OF BOHDAN A. FUTEY, OF CLEVELAND, OH, TO BE JUDGE OF THE U.S. CLAIMS COURT

Mr. **FUTEY**. Good afternoon, Mr. Chairman.

Senator **THURMOND**. Mr. Futey, how has your experience as Chairman of the Foreign Claims Settlement Commission prepared you for the responsibilities of a judge of the U.S. Claims Court?

Mr. **FUTEY**. Well, I have had the honor, Mr. Chairman, of being appointed by the President to serve as Chairman of the Foreign Claims Settlement Commission in 1984, and I was consequently reappointed in 1985 for a new three-year term.

And in my capacity as Chairman of the Foreign Claims Settlement Commission, I, together with two part time commissioners, am authorized by statute to adjudicate claims of American citizens for property expropriated in foreign countries.

As Chairman and as Commissioner, I had to review evidence, briefs and memoranda, and also the applicable laws of the United States, as well as international relations, international laws, in adjudicating these claims.

Therefore, that experience will definitely enhance my position and help me—to be a better judge when I am confirmed by the Senate.

Senator THURMOND. As Chairman of the Foreign Claims Settlement Commission, your decisions both as to law and fact cannot be reviewed or questioned in any court. As a Claims Court judge, your decisions will be reviewed by the U.S. Court of Appeals for the Federal Circuit and you will be bound to follow the precedents established by that court.

Do you anticipate any difficulty in making the transition to a position in which your decisions will be subject to review and reversal by a higher court?

Mr. FUTEY. No, I do not, Mr. Chairman. I believe that it is the responsibility and the duty of every judge to be fair and impartial, considerate, and also be sensitive to the issues involved and follow the laws according to the intent of the Congress.

I will not have any problems of applying the laws to a specific fact situation in front of me.

Senator THURMOND. Once the Foreign Claims Settlement Commission certifies a claim, it is paid from a fund that does not consist of taxpayer dollars. The funds are either a product of negotiations with a specific foreign government, or else the proceeds of assets of that government which have been seized in the United States, is that correct?

Mr. FUTEY. That is correct.

Senator THURMOND. Final judgments of the U.S. Claims Court, by contrast, are paid from the Federal Treasury. How do you think that fact will influence your decisionmaking process if you are confirmed as a Claims Court judge?

Mr. FUTEY. Well, let me just answer that question by basically repeating somewhat what I have said previously and perhaps add a different light. I believe that a judge shall be fair and impartial and do justice by applying to the best of his or her ability existing laws to the facts.

Let me quote Abraham Lincoln here, and this is the motto that is inscribed in the wall of the building housing the U.S. Claims Court, and I quote, "It is as much the duty of government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." I do not see any problem in adhering to that.

Senator THURMOND. I presume you have no hesitancy to enter judgments against the United States, even in some cases where they are very large judgments, to be paid by federal tax dollars if the proven facts and the applicable law warrant it.

Mr. FUTEY. Well, as Chairman of the Foreign Claims Settlement Commission, and the Commission itself, we have been adjudicating claims and our responsibility is to assure that all requirements, statutory requirements as enacted by Congress, are met.

Once those requirements are met throughout the process, we try to assure that all of these requirements are equally applied to all claimants, and I am certain that the same will be applicable to the claimants in the U.S. Claims Court.

Senator THURMOND. Are you admitted to practice before the U.S. Claims Court or its predecessor court?

Mr. FUTEY. I have not practiced before the U.S. Claims Court.

Senator THURMOND. Have you ever conducted any legal business before the court to which you have been nominated?

Mr. FUTEY. No, I have not.

Senator THURMOND. How do you plan to acquaint yourself with the procedures of the Claims Court and with the customs and practices of the rather specialized bar whose members regularly practice there?

Mr. FUTEY. Well, I have had the good fortune of discussing some of the procedures of the U.S. Claims Court with the fine judges on the bench right now, especially the Chief Judge, Loren Smith, who has done a wonderful job as Chief Judge in that particular court.

I also have been fortunate to receive quite a bit of information from the Judicial Center on the procedure, and I believe that my past experience as an attorney, prosecutor, and as Chairman of the Foreign Claims Settlement Commission would be helpful, and would contribute to my improvement as judge of the U.S. Claims Court.

Senator THURMOND. A Claims Court judge, like any other, must be prepared to try cases, but he or she also must be prepared to settle them. Some attorneys who practice before the Claims Court think that the Court does not currently take an active enough role in encouraging the settlement of cases before it.

What experience have you had as an advocate in the settlement of cases, and what role do you think a judge should play in bringing the parties together to compromise their differences and make a trial unnecessary?

Mr. FUTEY. As a practicing attorney, I served on an arbitrations board for the municipal court in Cleveland, as well as the common pleas court in Cuyahoga County. In such capacity, I was exposed many times to the process of settlement and we always tried to encourage that. That is the practice I will take with me to the U.S. Claims Court and try to facilitate any compromise and settlement of matters.

Senator THURMOND. Every lawyer has a professional obligation to devote some of his or her time and expertise to serving the disadvantaged and the community at large. What activities can you point to that best exemplify how you have discharged this obligation?

Mr. FUTEY. Well, first of all, in my practice I received numerous assignments from the Court of Common Pleas to assist indigent clients. I also contributed pro bono work on special occasions organized by the bar association in the greater Cleveland area.

My former office assisted the legal aid society in Cleveland to do pro bono work in their efforts. As a matter of fact, as Chairman of the Foreign Claims Settlement Commission, I have encouraged all our staff attorneys to do pro bono work at any opportunity that they may have.

Senator **Thurmond**. Thank you very much. I think that is all the questions we have, and I congratulate you on your appointment by the President, who is a good President, in my opinion.

Mr. **Futey**. I totally agree.

Senator **Thurmond**. I hope you have a successful career on the bench.

Mr. **Futey**. Thank you very much, Mr. Chairman.

Senator **Thurmond**. Now, we will ask Mr. Robinson to come around, please. Now, there is a vote on and I have just got about ten minutes, so if you will make your answers short, we will ask them as fast as we can.

TESTIMONY OF WILKES C. ROBINSON, OF OVERLAND PARK, KS, TO BE JUDGE OF THE U.S. CLAIMS COURT

Mr. **Robinson**. Thank you, Mr. Chairman.

Senator **Thurmond**. I note you were permitted to practice before the old U.S. Court of Claims, now called the Claims Court, in 1962, but your questionnaire responses did not list any cases you had tried there.

Have you ever tried a case before the Claims Court or its predecessor court, and if so, when?

Mr. **Robinson**. Actually, Senator Thurmond, it was earlier than 1962. While acting as an attorney for the Seaboard Airline Railroad Company, I brought a case involving General Accounting Office cutbacks in the U.S. Court of Claims.

That case was transferred to the ICC and subsequently decided by the ICC and returned to the Court of Claims, but by that time I had left the Seaboard Railroad, so the disposition of it finally was not my responsibility.

Senator **Thurmond**. How do you plan to familiarize yourself with the Claims Court procedures and with the customs and practices of the Claims Court bar?

Mr. **Robinson**. I have already begun doing many of the things that Judge Futey just mentioned that he is doing. I have received from the Judicial Center all of the materials on the Claims Court, including their practices and procedures, and I am beginning a study of the Federal Rules of Evidence to refresh my recollection of those rules. But I have already read the Claims Court rules.

Senator **Thurmond**. From 1980 to 1985, you were President of the Gulf and Great Plains Legal Foundation, I believe.

Mr. **Robinson**. Yes.

Senator **Thurmond**. What were the principal activities of this foundation during the period when you served as its president?

Mr. **Robinson**. Senator Thurmond, the Gulf and Great Plains Legal Foundation was a public-interest law firm that was non-political in nature which was created for the sole purpose of serving in the public interest and representing clients who could not otherwise have afforded counsel in cases involving to some extent major public policy issues.

However, there were many small cases involving individuals and individual rights and liberties.

Senator **Thurmond**. Now, what were your principal duties as president? For example, were you primarily an administrator, fund-raiser, litigation attorney, or what?

Mr. **Robinson**. I had a general counsel, Senator Thurmond, who was directly in charge of all litigation, but he reported to me. So the selection process, the determination of whether a case fit within the Foundation's criteria was my responsibility.

And I did review all of the pleadings, all of the briefs that were filed. I went to some of the court hearings, but although I was one step removed from actually presenting the case in court myself, I had to familiarize myself with court procedures and rules.

Senator **Thurmond**. Claims Court judges conduct non-jury trials and at the conclusion of the case they generally render written opinions. Some of these cases are extremely complex. Consequently, some of these written opinions are quite detailed.

I have been advised by members of the Claims Court bar that the written decisions have generally become more detailed since the court was reorganized in 1982. They advise me that the preparation of clear, concise written opinions is a very important function of a Claims Court judge.

The only writing sample you submitted to the Committee was the annual report of the Gulf and Great Plains Legal Foundation. What activities in your career best exemplify the sort of detailed legal writing on complex issues that will be an important part of your responsibility as a judge of the U.S. Claims Court?

Mr. **Robinson**. Senator Thurmond, while practicing for two major railroads I tried many, many cases—I think probably between 50 and 100 cases before the Interstate Commerce Commission, and approximately 15 or 16 State commissions.

In connection with many of those proceedings, I was required to write briefs and many other pleadings. So I think my experience in that regard particularly qualifies me to write detailed opinions in the Court of Claims.

Senator **Thurmond**. There is a vote on and I have got to go now. We will take a recess until after the vote, and probably Senator Leahy will be back at that time. If not, I will ask counsel to present the questions to you and you can answer them for the record.

I hope you enjoy your service on the bench and I congratulate you on being appointed by President Reagan.

Mr. **Robinson**. Thank you very much, Senator Thurmond.

[Recess.]

Senator **Leahy**. The committee will come to order. I have been over on the Senate floor for the last 5 hours handling a routine agricultural matter that was supposed to take 6 minutes. It was a bill to extend the life of a commission which went out of existence on March 31st. The debate so far has taken longer than the life of the commission.

On this bill on an advisory commission referring to dairy policy, we spent several hours debating an issue of sodbusters, and went from there to just how much we should cut back the foreign aid to Panama and what we should do about General Noriega.

I mention this only for those students of government and the rule of germaneness. I mention it, but not in a way to suggest that there is any germaneness in government or rules involved.

Tell me, sir, do you have any members of your family here?

Mr. **Robinson**. Yes, I do, Mr. Chairman. This is my wife, Julia Robinson, and I am pleased to introduce you to her, Mr. Chairman.

Senator **Leahy**. Thank you. We are delighted to have you here, Mrs. Robinson.

Mr. **Robinson**. My three sons were not able to be here, but they are with me in spirit.

Senator **Leahy**. Please give them my best.

Some of the questions that came up in our review regarded your litigation experience. I would just like to clarify the record a little bit on that issue.

You state in your questionnaire, and I quote, "because of the nature of my practice from 1966 to 1980, primarily corporate law, I had few cases which required court appearances. Most of my trial work occurred during the period from 1954 to 1966," and then you list a total of five cases in the federal courts in the period since 1980. Let me just ask a couple of questions about each of these cases.

There was *Widmar* versus *Vincent* which went to the Supreme Court in 1981. On page 13 of your case listing you describe your involvement as follows, that you acted as advisory counsel to counsel representing the individual plaintiffs, and acted as co-counsel to the bible study groups along with other counsel employed by Gulf and Great Plains Legal Foundation.

Now, does that pretty accurately describe your role in that litigation, sir?

Mr. **Robinson**. Yes, substantially so.

Senator **Leahy**. Were you involved with this case when it was tried before the district court in Missouri?

Mr. **Robinson**. No. That case had actually already begun at the time I came to the foundation.

Senator **Leahy**. Now, did you file any other lawsuit in this controversy in the district court?

Mr. **Robinson**. We did bring litigation there in the district court in Kansas, which is, of course, just across the State line.

Senator **Leahy**. What was the name of that case, sir?

Mr. **Robinson**. Country Hills Christian Church—it was a Country Hills Christian Church case against the Shawnee Mission School Board and School District.

Senator **Leahy**. The *Widmar* case was decided in the Eighth Circuit Court of Appeals under the caption *Chess* v. *Widmar*. What was your participation in the case at that point?

Mr. **Robinson**. You referred to *Vincent* v. *Widmar*; I think Chess is one of the other named plaintiffs in the case.

Senator **Leahy**. Yes.

Mr. **Robinson**. I directed the litigation, Mr. Chairman, as president of the foundation. The general counsel who was actively handling the case reported to me.

Senator **Leahy**. Now, I understand that that court of appeals case is listed in Volume 635 of Federal Second, but your name does not appear as counsel in that case. Was that an inaccuracy.

Mr. **Robinson**. No, no. This is the way it should have been because unless you are actually arguing the case or personally appearing before the court and admitted to practice before that court, your name would not be ordinarily listed on the pleadings.

Senator LEAHY. Did you offer any oral argument at the Eight Circuit?

Mr. ROBINSON. No, sir.

Senator LEAHY. Were you there for the argument?

Mr. ROBINSON. Yes, and I was there for the argument before the Supreme Court.

Senator LEAHY. Well, in the report of the court of appeals decision listed as counsel for amicus curiae Bible Study, et al, are the names of Charles Blackmar and Jane Nelson of Kansas City. Do you know these lawyers?

Mr. ROBINSON. Yes. Charles Blackmar was my general counsel for the foundation and he reported to me, and Jane Nelson did, also. She was a staff attorney for the foundation.

Senator LEAHY. And you said you attended the oral arguments at the Supreme Court?

Mr. ROBINSON. Mr. James Smart from Kansas City was the attorney who made the argument, and much of his preparation for that argument before the Supreme Court stemmed from our advice and counsel from the foundation.

Senator LEAHY. Now, in the Supreme Court decision it says "briefs of amici curiae urging affirmance were filed by Wilkes C. Robinson and Jane E. Nelson for Bible Study," Six other amici are listed on the same side of the case.

So your client was not actually a party; it was amicus curiae?

Mr. ROBINSON. It was a parallel proceeding and it did not proceed. See, we were representing the bible study groups themselves and not the individual plaintiff bible students who were members of those groups.

And since they played a more active role in the denial of their rights, we thought that case ought to proceed up through the appellate process.

Senator LEAHY. But you did not offer any oral argument yourself?

Mr. ROBINSON. No, sir.

Senator LEAHY. Who was the opposing counsel in Widmar?

Mr. ROBINSON. The general counsel of the University of Missouri School System, and I think his name was Wright, but he is retired now and his assistant is now counsel for the University of Colorado, I believe.

Senator LEAHY. What about a Ted Ayres? Did you know a Ted Ayres?

Mr. ROBINSON. Yes, that name is familiar, but I—I think he may have been one of the parties in the case.

Senator LEAHY. Mr. Wright said that Ayres had argued the case, I guess, for the university both at the Eighth Circuit and the Supreme Court.

Mr. ROBINSON. Right; he was there.

Senator LEAHY. Did you have any contact with him during the pendency of this litigation?

Mr. ROBINSON. I think I talked to him once on the phone—it was either he or Mr. Wright—involving the Eighth—involving some aspect of the proceeding, but I cannot recall.

Senator **Leahy**. Now, you said in your statement that you were advisory counsel to counsel representing the individual plaintiffs. Does that mean James Smart?

Mr. **Robinson**. Yes.

Senator **Leahy**. What does advisory counsel mean?

Mr. **Robinson**. Well, he felt it was necessary for him to come to the foundation to get some training with respect to his oral argument before the Supreme Court. So we formed a group and actually quizzed Mr. Smart to help prepare him. So in that sense I was an advisory counsel, as he will quickly tell you.

Senator **Leahy**. Now, you listed the case of *Country Hills Christian Church* versus *Unified School District Number 512,* and you say you "acted as co-counsel for plaintiffs in directing prosecution of the case, assisting in drafting of pleadings and briefs, and supervision of other counsel."

How did you first get involved with that case?

Mr. **Robinson**. Well, that is an interesting story. I met one of the members of the board of the church on a plane flying to some point and he began to tell me about how the Shawnee Mission School Board would not grant their application to use a school facility on Sunday for their prayer meetings and religious services.

And since I knew very well about Vincent versus Widmar and I felt that was right in point on their problem, one thing led to another and his church decided to oppose the school board in their efforts to restrict them from using these facilities solely on the basis of the content of their speech. In other words, it was a religious free speech case.

So that is how I found out about it and, of course, ultimately we won that suit in the district court. Mr. Peterson and Lou Ann Ridgeway were my two counsel in that case, along with a Mr. Marvin Rainey, who is an attorney in Overland Park and experienced before the district court there.

Senator **Leahy**. How long a trial was that?

Mr. **Robinson**. I would say five days, four or five days.

Senator **Leahy**. And you attended the trial?

Mr. **Robinson**. Yes.

Senator **Leahy**. Did you cross-examine witnesses?

Mr. **Robinson**. No, I did not.

Senator **Leahy**. Did you offer any argument in the court?

Mr. **Robinson**. No.

Senator **Leahy**. Did you argue any motions or anything like that?

Mr. **Robinson**. No, I did not, not in that case.

Senator **Leahy**. Did you appear as a witness?

Mr. **Robinson**. No, I did not.

Senator **Leahy**. You did not authenticate some letters you sent to the school board before the suit was filed?

Mr. **Robinson**. I am sorry, I did not hear.

Senator **Leahy**. You were not called as a witness to authenticate some letters that had been sent to the school board before the suit was filed?

Mr. **Robinson**. I cannot recall. There were some letters between attorneys for the school board and the foundation. In fact, former Governor Bennett and I corresponded with one another about the case, but I am not sure whether those letters were introduced in evidence or not.

Senator LEAHY. But you do not recall testifying as to their authenticity?

Mr. ROBINSON. No, I——

Senator LEAHY. You do not recall yourself being a witness in the case?

Mr. ROBINSON. No, I do not.

Senator LEAHY. Now, the official report of the case in Volume 560 of Federal Supplement lists as counsel for the plaintiffs Dan Peterson, Barbara Lou Ann Ridgeway, Gulf and Great Plains Legal Foundation of America, as well as some local counsel.

You are not listed in that case. Why is that?

Mr. ROBINSON. For the simple reason, sir, that these attorneys reported to me and they had the primary responsibility for the trial of the case, and I wanted them to have that.

Mr. Peterson was not a tremendously experienced attorney and this was a great learning experience for him. Furthermore, I was not admitted to practice in that district court.

Senator LEAHY. Were Mr. Peterson or Ms. Ridgeway admitted to practice before that court?

Mr. ROBINSON. Pro hoc, they were for that special case.

Senator LEAHY. But you could have been, too.

Mr. ROBINSON. I could have been, but it was not necessary.

Senator LEAHY. If he was not too experienced, did you not feel any kind of trepidation in just sitting there and not being admitted in case you might have to move in or be involved?

Mr. ROBINSON. That is why I had Mr. Rainey there.

Senator LEAHY. Well, if you were admitted just for that case, you would probably have had local counsel anyway, would you not?

Mr. ROBINSON. Well, I would have had him for local counsel anyway, but that was one of the reasons. He had experience before that judge and before that court.

Senator LEAHY. Now, who did Governor Bennett negotiate with during the suit?

Mr. ROBINSON. With me.

Senator LEAHY. With you?

Mr. ROBINSON. Yes.

Senator LEAHY. Not with Mr. Peterson?

Mr. ROBINSON. I do not think Mr. Peterson had any negotiations with him. Mr. Chairman, most of this is not very recent in my memory.

Senator LEAHY. I understand.

Now, the plaintiffs obtained an injunction from the trial court, notice of appeal was filed, and the case was settled. What kind of role did you play in the negotiations leading up to the settlement, if you recall?

Mr. ROBINSON. Yes, I played some role in it because the opposing counsel in the case and I, of course, had been friends and still are. So I was kept informed of the process of the negotiations by my staff counsel and advised him on how to proceed with those negotiations from time to time.

Senator **Leahy**. Let me ask you about Hollis versus the United States, which was a windfall profits tax case. I do not know if this was ever officially reported; I could not find it.

But you said you represented the plaintiffs, Mr. and Mrs. Hollis, and Gene Quinnett, is that correct?

Mr. **Robinson**. Yes.

Senator **Leahy**. Did you enter an appearance in that case?

Mr. **Robinson**. I believe I did when the pleading was filed in Oklahoma City, but subsequent to that I did not enter an appearance in the case. We had local counsel, a Mr. Work, in Oklahoma City.

Senator **Leahy**. The summary that was prepared for me said that the district court dismissed the complaint which sought to declare the windfall profits tax unconstitutional. The Court of Appeals for the Tenth Circuit then reversed and remanded for trial, but the case was then resolved because the constitutional issues had been resolved adversely to your clients in another case.

Is that summary basically a correct one?

Mr. **Robinson**. That is an absolutely correct statement, I am sad to say.

Senator **Leahy**. Well, was any testimony taken in the case?

Mr. **Robinson**. No. It did not reach that point because the dismissal was on a procedural ground which we took issue with.

Senator **Leahy**. So you neither examined nor cross-examined witnesses?

Mr. **Robinson**. No.

Senator **Leahy**. Did you offer any argument either at the district court or the court of appeals?

Mr. **Robinson**. No, I did not.

Senator **Leahy**. Now, you listed the opposing counsel as Jack Warren of the Tax Division of the Justice Department. What kind of contact did you have with him during this case?

Mr. **Robinson**. No direct contact, only through Mr. Peterson and Ms. Ridgeway.

Senator **Leahy**. I see.

Now, the next case, Rocky Mountain College versus South Dakota Utilities Commission, was fought out apparently mostly in an administrative proceeding. After a suit was filed, I am told, in district court, the Utilities Commission reopened the case. The lawsuit was ultimately dismissed.

What involvement did you have in the court proceedings in that case, sir?

Mr. **Robinson**. I appeared before the federal district court in South Dakota in Pierre initially. When the case was filed, of course, my responsibility was to get the suit filed, and then as soon–the day that we filed the case, Mr. Chairman, the Commission reopened the proceeding when they learned we were filing the suit.

So they scheduled another hearing on it, and after rehearing, which Mr. Peterson handled under my supervision, we won the case before the Commission so the federal litigation was dismissed.

Senator **Leahy**. Now, was testimony taken?

Mr. **Robinson**. Oh, yes.

Senator **Leahy**. Did you cross-examine witnesses?

Mr. **Robinson**. No, I did not.

Senator **Leahy**. Did you offer argument to the court on any occasion?

Mr. **Robinson**. No.

Senator **Leahy**. Your questionnaire says that you "directed the filing of the suit and supervised the litigation and negotiated the settlement with opposing counsel," and it lists Mr. Walter Washington as opposing counsel.

What did you negotiate with him, the dismissal of the lawsuit or the merits of the underlying natural gas rate dispute?

Mr. **Robinson**. Well, we argued, of course, informally with him before the rehearing was actually held about the merits of the case and I had talked to him on several occasions on the phone.

But I think after the rehearing and the admission of new evidence that they took in the case, the Commission became convinced that our position was correct. But I had no further contact with him subsequent to the decision of the Commission.

Senator **Leahy**. Now, finally, you list the case of *Allison* versus *Block*, which concerns Farmers Home foreclosure proceedings, and you said that you "directed the investigation of the case, filing of the suit, and supervised litigation."

The district court's decision is reported at 556 F. Sup. 400, but lists as plaintiffs' counsel Dale Reesman of Booneville, Missouri.

Mr. **Robinson**. Right.

Senator **Leahy**. So did you direct the filing of the suit or had it already been filed before the Gulf and Great Plains Legal Foundation got involved in it?

Mr. **Robinson**. We represented the Allisons in the case, and Mr. Dale Reesman acted as co-counsel and he had other cases that he was handling that were parallel cases in other courts.

I am not sure about what cases they were, but the Foundation appeared in both of the Allison suits.

Senator **Leahy**. When did they get involved?

Mr. **Robinson**. You mean what year were they filed?

Senator **Leahy**. No, no; at what point in the case: before the suit was filed, during the trial, during the appeal, after the appeal?

Mr. **Robinson**. No, no. The Foundation became involved early on before the actual trial of the case.

Senator **Leahy**. Mr. Reesman says he has no recollection of contact with you on the case until after the trial was concluded and the case was on appeal.

Mr. **Robinson**. You mean contact with me personally?

Senator **Leahy**. Yes.

Mr. **Robinson**. I do not remember, Mr. Chairman, exactly the date that we first had contact, but Mr. Reesman had many meetings in our——

Senator **Leahy**. He does not have any recollection of contact with the Foundation until after the case was tried. Does that square with your own recollection?

Mr. **Robinson**. No. I do not recall whether it was just on appeal that we were involved. I seem to recall some hearing on some motions, Mr. Chairman, but I cannot be exact in my testimony about that now.

Senator **Leahy**. Neither the district court nor the court of appeals show an appearance for you. Did you enter an appearance?

Mr. ROBINSON. No, I did not.

Senator LEAHY. As opposing counsel, you list a Mr. Robert Ulrich, who is the U.S. attorney in Kansas City. What contact did you have with him?

Mr. ROBINSON. Only through our own staff counsel.

Senator LEAHY. And the district court decision lists Larry Coleman, the assistant U.S. attorney, as counsel for the defendant. Did you have any contact with him?

Mr. ROBINSON. No.

Senator LEAHY. And the court of appeals lists Mr. Ulrich, whom we have already discussed, and a Mark J. Zimmerman, assistant U.S. attorney, as counsel for appellants. Did you have any contact with Mr. Zimmerman?

Mr. ROBINSON. No, I did not.

Senator LEAHY. The assistant U.S. attorney most recently assigned to this case was Gene Harris. Did you have contact with him?

Mr. ROBINSON. Only through our own staff counsel.

Senator LEAHY. Now, we have gone over a lot about your litigation experience when you were President of the Gulf and Great Plains Legal Foundation. Tell me a little bit about what you have been doing since you left the Foundation; was that in 1984 or 1985?

Mr. ROBINSON. In May of 1985.

Senator LEAHY. What have you been doing since then, sir?

Mr. ROBINSON. I was counsel for Howard Needles Tammen and Bergendoff, an architectural engineering firm, and I had several clients, corporate clients, also in the practice of law. One of them was HSD Corporation, which is another architectural engineering firm, and a printing and lithographics firm called Upper Case that I represent.

I also have begun a real estate and brokerage firm called SR Financial Group, Inc., and it is primarily engaged in the sale of businesses for clients on a commission basis.

Senator LEAHY. You did not try cases, though? I mean, you did not go into courtrooms?

Mr. ROBINSON. No.

Senator LEAHY. The reason I ask that is if you look at your active trial practice, cross-examining witnesses, and so on, most of that was about 20 years ago, and yet the position you have been nominated for is a trial court position.

In my own experience as a trial lawyer, I do not think too many cases are handled in the Claims Court on motions. There is usually an actual trial and you have sworn witnesses, depositions, cross-examination, and so on. So a claims court judge is not just an administrator; you are trying cases.

Obviously, somebody who has tried a lot of cases and is used to trying a lot of cases, likes to try cases, has been involved in trial work ideally on both sides, steps in a lot easier. You are going to have to make some transitions if you go in there.

Now, can you make that transition to go from the type of law practice you have had for the past two decades to suddenly becoming a very active trial judge?

Mr. ROBINSON. Mr. Chairman, I feel that I can. If you will look at the answers that I have submitted to the questionnaire, you will see that I have had a very broad background as an attorney. I have practiced law for 36 years and I have never really been too far removed from the courts even though I did not actively participate directly in the trials, as you have pointed out.

Even as a corporation lawyer, I had the responsibility for supervising outside counsel in much litigation both at Monsanto and as a general counsel of Marion Laboratories. But as you pointed out, also, most of that experience in active trial work was before commissions.

I have been before 15 State commissions and the Interstate Commerce Commission, the USDA, the FDA and many other agencies in Washington, and I think that background will allow me to adapt very quickly to being a competent trial judge.

I am a sort of a journeyman lawyer; I have had broad experience, as I say, but I am a hard-working lawyer, Mr. Chairman. I am willing to devote the time and effort necessary to bring me up to the standards of this court, which I consider to be very high, particularly in view of the training that I see that I will be required to undergo.

Senator Leahy. In the annual report you submitted to the Committee from the Foundation, it lists as one of the Foundation's goals to "support the right of businesses to be free of arbitrary regulation," something that I assume all of us would be in favor of.

But there is, of course, sometimes a dispute about whether regulation is arbitrary or reasonable, and Claims Court cases often come up in the context of a regulatory system.

A lot of times, the case is going to be decided not so much on whether we happen to like that particular regulation or not, but on whether the claimant has complied with the regulatory requirements.

Are you going to have any difficulty moving from the role of an advocate, perhaps, for the removal of such regulations to one who has to judge compliance with the regulation? The regulation may perhaps be onerous philosophically but it is legally there and now you must make a decision based on how people have acted within that regulation.

Mr. Robinson. Mr. Chairman, I feel——

Senator Leahy. Can you swing from the advocate to the judge?

Mr. Robinson. I understand the question, sir, and I feel that I can because I have, of course, been a trial court judge in two courts in Alabama, albeit many years ago, and I had the responsibility for adapting very quickly to circumstances in the courtroom.

So I feel that I have a talent that goes beyond just being a competent administrator, and I am advised, Mr. Chairman, by Chief Judge Loren Smith that most of the cases in the Claims Court are not tried. Only five percent of the cases actually reach trial. The biggest majority of them are settled out at some stage in the procedure.

I have, I feel, an ability in that area because so much of my practice has been in negotiation. I have negotiated complex patent licensing agreements with many foreign persons, as well as domestic companies, for both Monsanto and Marion Laboratories.

And I have also done much merger and acquisition work, and as you well know, when dollar are on the table bringing two parties together is often a difficult task and I have had to do that, too.

So I feel that I can have the kind of fair and open mindedness for this court position that I think it requires.

Senator LEAHY. My last question: Are you a member of any club or other organization that discriminates on the basis of race, gender, or national origin?

Mr. ROBINSON. As I indicated in my answer to the questionnaire, the only club that I belong to that might contravene that implication in that question is Rotary Club 13 in Kansas City, but it is so far downtown that I had already indicated to them I was going to resign. So I guess I will do that anyway.

Senator LEAHY. Do you belong only to uptown clubs?

Mr. ROBINSON. Well, I have not made application yet.

Senator LEAHY. I understand. Well, thank you very much, Mr. Robinson.

I do not know whether Senator Thurmond had any questions.

Mr. SHORT. No, sir.

Mr. ROBINSON. Mr. Chairman, I want to thank you for your courtesy.

Senator LEAHY. Well, I thank you, sir, and I apologize for being late. One of the other hats I wear is as Chairman of the Senate Agriculture Committee and we did want to get this piece of legislation through, and we were either going to do it today or it was not going to get done and it took longer than I thought. I appreciate your standing by.

Mrs. Robinson, I am sorry we had to keep you here so long, too. You ought to be able to go out and see some of the cherry blossoms while you are in town. The one thing I can say to you is if you are going to be here tomorrow, at least tomorrow when you have a chance to be outdoors, the weather will be a lot nicer than it is today.

Mr. ROBINSON. Well, thank you again; I appreciate it.

Senator LEAHY. Thank you, sir.

We will stand in recess.

[Whereupon, at 4:24 p.m., the committee was adjourned.]

[The following material was subsequently supplied for the record:]

BENNETT, LYTLE, WETZLER, WINN & MARTIN
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ROBERT F. LYTLE
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OF COUNSEL

April 23, 1987

The Honorable Patrick J. Leahy
Senate Judiciary Committee
Room SD-224
Washington, D. C. 20510

Attention: Mr. Steven J. Metalitz

Dear Senator Leahy:

I have had two telephone calls from your special counsel and have also received his letter of April 20, 1987 with reference to the participation of Wilkes C. Robinson in the case of Country Hills Christian Church v. Unified School District 512.

Before responding to the inquiries made, please understand that this case was litigated several years ago. Our files on the matter have been since "stripped" and, as a consequence, I do not have files in my possession to refresh my recollection. With these limitations, the following observations are offered:

1. Our firm is general counsel for Unified School District 512. As such, we, from time to time, render legal opinions to the district on diverse matters. One of those legal opinions related to the utilization of school facilities for religious purposes. Without attempting to repeat the legal opinion in full, it generally was to the effect that district facilities could not be used for such purposes, either before, during or after school.

2. The legal opinion was followed for many years without any difficulty. From time to time, churches would apply for use and their applications would be rejected, all without subsequent occurrence.

3. As I recall it, in 1982, the Country Hills Christian Church filed an application to use school property for church services on a "special" Sunday. I do not remember what the specific occasion was. In accordance with the policies of the district and the practices prevailing at that time, the application was rejected. Subsequently, other applications were filed and the district was led to believe that they were filed pursuant to "legal advice". These applications also were rejected.

4. According to my recollection, Mr. Robinson contacted the superintendent of the district, asking for reconsideration and indicating that his clients, or the clients of the foundation, would be willing to work something out to control or restrict the use, if the district were willing to negotiate on that basis. The district was disinclined to negotiate, both because of its concern about the divisiveness that might occur with religious use of school property and also because it was felt that that use was constitutionally proscribed.

5. Mr. Robinson continued to negotiate with the then-superintendent of the district, with Mr. Vratil, who was then with our firm, and with me, all by telephone conversations and by correspondence. "Negotiations" may be an inappropriate term, since the district was taking a firm position against religious use of school facilities under any circumstances. Its position, simply stated, was that such use was inappropriate and violative of constitutional limitations and that, as a consequence, it would be impossible to develop an acceptable alternative even if the facilities were used in the dark of night and with a total cloak of secrecy. To the best of my knowledge, all negotiations carried on in behalf of the church and the legal foundation were carried on by Mr. Robinson.

6. I assume that when Mr.Robinson concluded that a settlement of the issue was impossible, he then sought and obtained from the church authority to institute suit in the United States District Court for the District of Kansas. In any event, suit was in fact instituted.

7. From and after the institution of suit, all trial procedures were carried on either by myself or by Mr. Vratil on behalf of the district and by Dan Peterson on behalf of the church and the foundation.

8. I have no idea who prepared the pleadings for the church and the foundation. However, all procedural matters, all depositions, and all hearings and the trial itself were conducted by Mr. Peterson on behalf of the foundation. The church, or the foundation, or both, retained the services of local counsel in the form of Marvin Rainey. However, his involvement in the case was minimal and, as nearly as I could determine, was primarily for the purpose of complying with the local counsel rule. Based upon my recollection, Mr. Rainey did not take or attend any of the depositions. He did attend, but only perfunctorily participated in, the hearings and trial of the case. In fact, I recall on several occasions we gave permission for Mr. Peterson to perform certain procedural acts in the absence of his local counsel.

9. To the best of my recollection, I do not remember Mr. Robinson being present at any of the hearings on pre-trial motions. Those hearings were handled by Mr. Peterson.

10. At the time of the trial, my recollection is that Mr. Robinson was present for only part of the trial. Mr. Rainey was present for the trial. Mr. Peterson actually tried the case. All examination and cross-examination was carried on by Mr. Peterson, as were all arguments to the court.

11. It is my recollection, and I have confirmed it with Mr. Vratil, who assisted me in trying the case for the district, that Mr. Robinson was called as a witness, primarily to identify letters of demand which had been sent to the superintendent of the district and perhaps to me. Neither of us remembers him testifying as to any other fact and, quite frankly, considered his testimony to be non-essential to the case since we had already stipulated to those.

12. At the conclusion of the testimony at the hearing, the matter was argued to the court and it was argued by Mr. Peterson. Neither Mr. Vratil nor I remembers Mr. Robinson being present at that time.

13. Other than the original complaint, which I believe was signed by both Mr. Robinson and Mr. Peterson, all of the pleadings in the case were, to the best of my recollection, signed by Mr. Peterson.

14. When the court made its decision holding in favor of the church and against the district, it reserved judgment on the claim by the legal foundation for attorneys' fees.

15. The district filed notice of appeal.

16. Mr. Peterson asserted a claim for attorneys' fees on behalf of the foundation representing the church, which was rather significant. He filed a brief in support of his request and included in that brief an analysis of time expended by various of the attorneys in the foundation office relating to the case. I am sure that brief is a part of the court's file and would reflect the extent to which time was charged against the case by Mr. Robinson. Obviously, there is a lot that goes on in lawsuits that may be unknown to opposing counsel and it is possible that a review of the accounting of time would indicate the work which may have been performed by Mr. Robinson on the case, of which we would have no knowledge.

17. The district made a determination that, if the case could be resolved, it did not want to continue to incur expense in prosecuting its appeal and, as a consequence, the final negotiations with reference to the case related to the payment of attorneys' fees. These negotiations were carried on by Mr. Peterson on behalf of the church and the foundation and primarily by Mr. Vratil of this office on behalf of the district. Neither Mr. Vratil nor I recall Mr. Robinson having any involvement with us insofar as these negotiations were concerned. The district's liability, to a limited extent, was covered by insurance and, to the best of our recollection, the insurance carried on most of its negotiations through us and, in turn, with Mr. Peterson.

18. You have inquired as to the length of the trial. To the best of my recollection, it took parts of two to three days.

19. You have inquired as to my negotiations with Mr. Robinson. Again, to the best of my recollection, as indicated above, the only negotiations which I had with Mr. Robinson occurred in advance of filing the lawsuit or, possibly, immediately after the filing of the lawsuit when Mr. Robinson was attempting to find some way to settle the dispute. As indicated,

> the negotiations were not lengthy in light of the fact that we were discussing a constitutional issue of law and it was very difficult to be either a little bit constitutional or a little bit unconstitutional. We were of the view that the use of public elementary and secondary schools for religious services was constitutionally impermissible and that the Vincent case was not controlling because it dealt in a university setting where attendance was not mandated. The church and the foundation felt otherwise and both sides had case law which directly or indirectly tended to support their respective positions. As a consequence, there wasn't much of an area in which settlement negotiations could occur.

I again want to emphasize that my responses to your inquiries are based on my recollections without being able to review the file. I also want to emphasize that I only know what happened with reference to direct contact by this office with the foundation. I do not know what role Mr. Robinson played in directing the attack of the foundation or the procedures and strategies ultimately utilized by Mr. Peterson.

If you have further questions, please advise.

Very truly yours,

BENNETT, LYTLE, WETZLER, WINN & MARTIN

Robert F. Bennett

mmr

WILLIAMS, REESMAN & TATE
ATTORNEYS AT LAW
827 EAST HIGH
P.O. BOX 44
BOONVILLE, MISSOURI 65233

WILLIAM MUIR WILLIAMS (1850-1916)
ROY D. WILLIAMS (1881-1972)
DALE REESMAN
LARRY E. TATE

TELEPHONE
AREA CODE 816
882-6525

April 24, 1987

Mr. Steven J. Metalitz
Special Counsel
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Nomination of Wilkes C. Robinson
United States Claims Court

Dear Mr. Metalitz:

In accordance with your letter of April 20th, after reviewing my files, I am setting out a brief chronology of the two Allison cases. I represented each of them in exhausting the FmHA administrative appeal process, and in both instances, filed suit to enjoin foreclosure by FmHA.

Kenneth Allison Case

11-05-80	Kenneth Allison v. Cavanaugh was filed - Western District, Missouri.
1981	Miscellaneous conferences were held with opposing counsel and the Court.
6-82	Interrogatories to defendants.
8-02-82	Depositions of county, district and state FmHA officials.
8-05-82	Pre-trial conferences.
9-10-82	Dan Peterson called-indicated Gulf and Great Plains Legal Foundations (GGP) was interested in the case, and could provide free legal services, including appellate briefs, amicus, etc. I was too close to trial for them to be of assistance, so told him I would appreciate their help later.
9-13-82	Trial (three days).

I had several conferences with GGP in late September and early October, 1982, and a decision was made for GGP to be associated with me in Kenneth Allison. Wilkes Robinson was involved in at least two of these conferences.

10-08-82 Motion for Extension of Time to File Past Trial brief was prepared and filed by GGP. Copy attached.

Thereafter GGP, through its staff attorney, Luann Ridgeway, actively participated in the preparation of the post trial brief, and in preparation for a hearing for temporary injunctive relief in December, 1982.

1-14-83 The Court entered judgment for plaintiffs. No appeal was taken. The case was heard and judgment entered by U.S. Magistrate Richard Ralston. It was not reported.

Roger Allison Case

Roger Allison, the son of Kenneth, received notice in late September, 1982, that his farm would be sold at foreclosure by FmHA on November 1, 1982. In early October, 1982, I contacted GGP for assistance.

10-15-82 Luann Ridgeway called to advise that GGP was working on the Kenneth Allison post trial brief, but they were too short-handed at that time to undertake any assistance on the Roger Allison case.

10-27-82 Roger Allison v. Block was filed, Western District, Missouri. The Court entered a TRO enjoining foreclosure on November 1st, and setting the matter for hearing on November 15th.

11-02-82 Judge Wright's law clerk called, requesting that plaintiffs' suggested findings/conclusions be filed on November 5th. I contacted Luann Ridgeway again. She indicated they could not help, but perhaps could do so at a later date.

11-15-82 Trial (one day).

12-08-82 The Court entered judgment for plaintiffs. 556 F. Supp. 400.

2-12-83 FmHA filed notice of appeal.

In February, 1983, GGP agreed to be associated with me on appeal. Thereafter, GGP through its staff attorney, Luann Ridgeway, actively participated in the preparation of appellee's brief.

10-14-83 I argued the case in the 8th Circuit, but received assistance from Ms. Ridgeway in preparation for argument. She appeared but did not argue.

12-23-83 The 8th Circuit affirmed. 723F.2d 631.

Summary

Mr. Robinson was the executive officer at GGP during the time in question. I have no doubt that he made the decisions as to number and kind of cases in which the foundation would participate.

My personal contact with Mr. Robinson was in conference with Mr. Robinson and his staff attorneys, in which we discussed the facts and legal theories at issue, and I did my best to encourage GGP to participate.

Luann Ridgeway was assigned to the Allison cases, and spent a great deal of time on the post trial motion (Kenneth) and the appeal (Roger). She did excellent work, and provided invaluable service to the Allisons.

As a matter of interest Allison v. Block was a significant factor in the decision in Coleman v. Block, 560 F. Supp. 1353, the national class action in which FmHA was enjoined from foreclosure for nearly three years.

If I can be of additional assistance, kindly so advise me.

Very truly,

WILLIAMS, REESMAN & TATE

Dale Reesman

DR:rk

enc.

FILED
OCT 8 1982
R. F. CONNOR, CLK.
U.S. DISTRICT COURT
WEST. DISTRICT
OF MISSOURI

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

KENNETH E. ALLISON and)
SARA F. ALLISON,)
)
Petitioners,)
)
v.) No. 80-4226-CV-C-H
)
GORDON CAVANAUGH, as Administrator of the Farmers Home Administration, United States department of Agriculture; UNITED STATES DEPARTMENT OF AGRICULTURE; and THE UNITED STATES OF AMERICA,)
)
Respondents.)

MOTION FOR AND SUGGESTIONS IN SUPPORT OF EXTENSION OF TIME

MOTION

Come now Kenneth E. Allison and Sara F. Allison by and through their attorney, Dale Reesman, and request that a thirty (30) day extension of the time be granted for the filing of Plaintiff's brief in the above styled cause. In the alternative, Plaintiffs seek a ten (10) day extension of time pursuant to W.D. Mo. Local Rule 6(A), or whatever relief the court deems just and proper.

SUGGESTIONS IN SUPPORT OF MOTION FOR EXTENSION OF TIME

In support of the foregoing motion, Plaintiffs state that:

1. Following a hearing on September 13, 14 & 15, 1982 before U.S. Magistrate Richard Ralston, Plaintiffs were given 30 days from September 15, 1982 in which to file a brief for final determination of their cause.

2. Subsequent to the September 13, 14 & 15, 1982 hearing dates, Plaintiffs' counsel was contacted by attorneys for Gulf & Great Plains Legal Foundation (Foundation).

3. Foundation expressed its interest in the public interest aspect of the above captioned cause and offered its assistance to Plaintiffs' counsel.

4. Foundation is a not-for-profit public interest law firm organized under I.R.C. §501(c)(3) as a charitable organization.

5. Counsel for Plaintiffs believes it to be in the best interest of his clients to have the aid and counsel of Foundation on the brief.

6. Since this case has been the subject of extensive proceedings, including trial, Foundation will require a short extension of time to become more throughly acquainted with the legal and factual issues of this case prior to writing the brief.

7. Several attempts were made to contact counsel for Defendants, Mr. Mark Zimmerman, to secure his agreement to this motion, but Mr. Zimmerman is out of his office and unavailable until October 13, 1982, two days before the briefs are due. Other attorneys in Mr. Zimmerman's office did not feel empowered to consent to the requested extension due to their inability to discuss the matter with Mr. Zimmerman.

8. Plaintiffs' counsel and Foundation are diligently pursuing the case and submit this motion not for delay, but that justice may be done.

WHEREFORE, Plaintiffs pray this Court to grant a thirty (30) day time extension or, in the alternative, a ten (10) day extension of time for filing the brief or whatever relief this court deems just and proper. If the court is unable to rule on this motion until the original thirty (30) day period for filing of Plaintiffs' brief has expired, Plaintiffs request that the extension of time be granted to run from the date of the ruling on this motion.

Respectfully submitted,

WILLIAMS, REESMAN & TATE

By: Dale Reesman
Dale Reesman
527 East High
Boonville, Missouri 65233
Telephone: 816-882-6525
Missouri Bar No. 17727

ATTORNEYS FOR PETITIONERS.

WILKES C. ROBINSON
10139 Craig Drive
Overland Park, Kansas 66212
(w) (913) 642-0200
(h) (913) 649-0013

24 April 1987

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
U. S. Senate
212 Dirkson Senate Office Building
Washington, D. C. 20510

Dear Chairman Biden:

I have received a copy of the transcript of my testimony before the Senate Judiciary Committee on April 7, 1987, which was sent to me to afford me an opportunity to review and correct it. One correction in substance should be made. I am writing to request that you approve this correction before the printing of my testimony.

On page 44, lines 7 and 8, I testified that the Foundation, in the case of Allison v. Block, "became involved early on before the actual trial of the case." After discussion of this matter with Ms. Luann Ridgeway, the Foundation's Staff Attorney who handled the case, and Mr. Dale Reesman, our co-counsel, I am advised that the Foundation became involved in Allison v. Block, only after the trial of the case. That particular statement should be corrected by striking the words "early on before" and substituting therefor "soon after". Also, on page 44, in lines 20 and 21, strike the words "No, I do not recall whether it was just on appeal that we were involved" and substitute therefor "We were involved soon after trial".

My faulty recollection of the timing of the Foundation's involvement was due to our participation in two Allison cases, Kenneth Allison v. Cavanaugh and Roger Allison v. Block at almost the same time, involving two members of the same family and substantially the same legal and factual issues. Although both cases were proceeding in two different forums, our first involvement was in the Kenneth Allison case at the trial court level. After a passage of well over four years, I only remembered that Ms. Ridgeway had attended a Court proceeding on behalf of the Foundation and I erroneously thought that her attendance was of the actual trial in the second case, Allison v. Block. She actually attended the oral argument on the appeal in that case. It was also the recollection of Mr. Jerald Hill, who succeeded me as President of the Foundation, and with whom I had reviewed the pertinent case summaries before submission of my response to the questionnaire, that we had participated in the Allison trial. In neither case did the Foundation participate in the trial, but actively participated in both cases soon after trial.

The case summary found in my response to the Senate Questionnaire and the Transcript, page 43, lines 12 and 13, should be similarly corrected to reflect that I directed the Foundation's investigation of the case, its participation in the suit and supervised the litigation. By "direction of the Foundation's investigation", I mean that I instructed the Foundation's staff attorneys to examine the facts and legal issues involved to determine whether the case fell within our criteria for pro bono representation.

On pages 32 through 36, Senator Leahy asked questions about Vincent v. Widmar, another case handled by the Foundation. I have reviewed my testimony about the Foundation's involvement in that case with Mr. James Smart, counsel for the plaintiffs. Attached hereto is a copy of his letter to me affirming that my testimony with regard to the Foundation's involvement in that case is accurate.

On pages 37 and 38 of the transcript, Senator Leahy inquired as to whether or not I had testified as a witness in the case of Country Hills Christian Church v. Unified School District No. 512 regarding the authenticity of some correspondence between myself and opposing counsel involving settlement negotiations. After a review of the Foundation's files by Mr. Jerald Hill, the Foundation's President, he has advised that my testimony was accurate. I did not testify as a witness at the trial. The Foundation's files show that I executed an affidavit dated November 18, 1982 attesting to the authenticity of certain correspondence. The affidavit may have been stipulated to as an exhibit in the case. Mr. Dan Peterson, former General Counsel for the Foundation, who personally handled the trial of this case, has also advised that I was not a witness in the case. Mr. Marvin Rainey, our associate counsel in the case, also advised that I did not testify as a witness in the case. His letter to me is attached.

As clarification, Mr. Peterson was not involved in the first settlement negotiations in Country Hills but was involved in the final negotiations in this case.

With above noted corrections to page 44 of the Transcript (and to my case summary for Allison v. Block), my testimony is accurate to the best of my knowledge.

I would appreciate your immediate consideration of this correction request.

Please let me know if you require anything further.

Sincerely,

Wilkes C. Robinson

Wilkes C. Robinson

ACKNOWLEDGEMENT

STATE OF KANSAS ss
COUNTY OFF JOHNSON

On this 25th day of April, 1987 before me, Fern Shepherd a Notary Public, personally appeared Wilkes C. Robinson, to me known to be the person described in and who executed the foregoing instrument, and after being duly sworn, acknowledged that he executed the same as his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Overland Park Kansas the day and year last above written.

Fern Shepherd

Notary Public in and for said County and State

My term expires Feb 20, , 1990

WCR:bjs

cc: Mr. Paul Gulley
Chief Printer

JOSEPH R. BIDEN, Jr., DELAWARE, CHAIRMAN
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MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
DENNIS W. SHEDD, MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

May 4, 1987

Mr. Wilkes C. Robinson
7500 W. 95th Street
Overland Park, Kansas 66212

Dear Mr. Robinson:

Thank you for your letter of April 24, requesting permission to correct the transcript of your testimony before the Judiciary Committee on April 7.

As you point out, your proposed correction would change the substance of your testimony. This is beyond the scope of corrections that witnesses are normally allowed to make. Therefore, the transcript of your testimony will not be changed to reflect these corrections. However, your letter and its attachments will be printed in the record immediately following the testimony in question, so that your corrections will appear as part of the official record of the hearing.

Sincerely,

Joseph R. Biden, Jr.
Chairman

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OVERLAND PARK, KANSAS 66212

MARVIN E. RAINEY
MICHAEL R. SANTOS
KENNETH C. SLOWINSKI
M. ELLIS RAINEY, II

TELEPHONE 913-341-5280

April 24, 1987

Wilkes Robinson
10139 Craig Drive
Overland Park, KS 66212

Dear Wilkes:

I am pleased to confirm certain facts pertaining to your participation in the Federal District Court case, Country Hills Christian Church vs. Shawnee Mission USD #512, in which I was associated.

As I recall, you personally directed all of the pre-trial negotiations and personally corresponded with Governor Bennett and the other attorneys for the school district. These proceedings were aimed at convincing the school district that it should voluntarily change its policy to permit use of school buildings by churches on the same basis as by other organizations. The parties later stipulated in court to admission of part of this correspondence as evidence that the school district had refused to permit use of the school building solely for the reason that it was to be used for a religious service. It is my recollection that you may have signed an affidavit authenticating the correspondence, however, you did not at any time appear as a witness at trial of the case.

You were present at the council table during trial and directed and participated in the proceedings, but did not examine witnesses or present oral arguments to the court.

In general, it is my recollection that you presided at all conferences during preparation of trial and directed and actively participated in both the preparation and trial of the matter.

Yours truly,

Marvin E. Rainey

Marvin E. Rainey

MER/js

CREWS, SMART, SOUTH, WHITEHEAD, REAVES AND WAITS, P.C.
Attorneys and Counselors at Law

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Alan E. South
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401 West 89th Street
Kansas City, Missouri
64114
816-363-5466

April 24, 1987

Steven J. Metalitz
Special Counsel
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Wilkes Robinson

Dear Mr. Metalitz:

I have reviewed the portion of the transcript from the Wilkes Robinson confirmation hearing which you enclosed with your letter of April 20, 1987.

In my opinion, the transcript accurately describes Mr. Robinson's participation in the case.

I would like to add, as well, that I was very appreciative of the assistance of Gulf and Great Plains Legal Foundation in Widmar v. Vincent. The help which I received from Wilkes Robinson and other members of his staff went far beyond the usual assistance provided by attorneys who are counsel to an amicus curiae. Mr. Robinson and the other attorneys on his staff were actively involved in helping me develop strategy in the case. In addition, they were actively involved in helping me prepare for the oral argument of the case, both in the Court of Appeals and in the U. S. Supreme Court. In my opinion, Wilkes Robinson is a very capable attorney and a person of excellent character.

Please let me know if I can be of further assistance.

Very truly yours,

James M. Smart, Jr.

James M. Smart, Jr.

JMS:crm

The Law Offices of
Warren W. Wear

Attorneys:
Warren W. Wear
Luann Ridgeway

P.O. Box 360
105 W. Main
Smithville, MO 64089

816-532-4211

April 24, 1987

Mr. Wilkes C. Robinson
7500 W. 95th St.
Suite 200, Valley View State Bank Bldg.
Overland Park, Ks. 66212

Re: Judicial Appointment

Dear Wilkes:

It was a pleasure speaking with you last Thursday, April 23, 1987. Our discussion concerned the fact that a question was raised during your confirmation hearing concerning the Allison cases for which Gulf and Great Plains Legal Foundation acted as co-counsel to Dale Reesman. I have spoken with Dale and the following is my recollection of events concerning the Allison case.

In late November, 1980, The Kenneth Allison case was filed. A pre-trial conference was held in August, 1982. In September, 1982, Dan Peterson, who was then General Counsel for the Legal Foundation, contacted Dale Reesman concerning assisting in representation of Mr. Allison. It was too close to the scheduled trial of the matter for any such assistance to be meaningful and , accordingly, trial proceeded during mid-September, 1982. The Legal Foundation's first involvement was following the trial when I researched and prepared a post-trial brief which was coordinated with Attorney Reesman. There were some post-trial motions filed with the court and I believe I attended the hearings on those motions. It is my memory that the court entered judgment for Kenneth Allison in early 1983 and no appeal was taken.

While the Kenneth Allison case was proceeding, the Roger Allison case came into being. Dale Reesman asked us to become involved at the trial level of this case but it was determined that the Foundation would be unable to take part in the trial of the matter due to the work load that already existed at the Foundation. The events surrounding the Roger Allison case took place during late 1982. Mr. Reesman was successful in obtaining a judgment for the Allisons. Following the decision of the District Court, the government filed a Notice of Appeal in Feburary, 1983. At that point, it was determined by the Foundation that the Roger Allison case would be appropriate for involvement by the Legal Foundation. As staff attorney for the Foundation, I researched and prepared the appellate brief for filing with the Eighth Circuit Court of Appeals. The Court heard oral argument on the matter on October 14, 1983 in St. Paul, Minnesota.

The Eighth Circuit affirmed the lower court decision on December 23, 1983.

As you can see, I do not remember involvement by the Legal Foundation at the trial level for either the Kenneth Allison or the Roger Allison case. However, I was quite involved in post-trial matters for both cases.

If you need further information, I would be happy to discuss the matter with you. As well, I would be happy to discuss this matter with the Senator making inquiries. Feel free to give them my name and telephone number.

Sincerely yours,

B. Luann Ridgeway
Attorney at Law

BLR/ls

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Answer: Ronald Sing Wai Lew, AKA Sing Wai Ronald Lew.

2. Address: List current place of residence and office-address.

Answer: Office address:
Los Angeles Superior Court
900 Third Street
San Fernando CA 91340

3. Date and place of birth.

Answer: September 19, 1941, Los Angeles, California.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and address.

Answer: Married to Mamie Wong. Spouse is employed as an administrative assistant with James R. Gary Realty, 21747 Erwin Street, Woodland Hills, CA 91367.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Answer: I attended Loyola University at Los Angeles from 1959 to 1964 and received a Bachelor of Arts degree, and Southwestern University School of Law from 1964 to 1966 and 1970 to 1971 and received a Juris Doctor degree.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Answer:

1984-present:	Judge, Los Angeles Superior Court.
1982-1984:	Judge, Los Angeles Municipal Court.
1976-1982:	Los Angeles Fire and Police Pension Commissioner.
1974-1982:	Partner in Avans & Lew, general practice of law.
1972-1974:	Los Angeles City Attorney's office as Deputy City Attorney assigned to the Criminal and Civil Liability Divisions.
1970-1972& 1963-1966:	Mandarin Laundry, family owned commercial laundry.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Answer: Yes. United States Army from February 1967 to December 1969; served as First Lieutenant in the Transportation Corp (OCS commission); serial number 05257619; honorably discharged.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Answer:

Recipient of the Los Angeles Basin Equal Opportunity League's Sixth Annual Commitment Award in 1987.

Made a honorary member of the Chinese Professional Society in 1985.

Awarded the Southwestern University School of Law Certificate of Appreciation in 1983.

Awarded plaques of appreciation for service on the Los Angeles Fire and Police Pension Commission from the Commission itself, the United Firefighters of Los Angeles, and the Los Angeles City Council in 1982.

Recipient of the United Way Volunteer Award in 1979.

Made a honorary life member of the Los Angeles Retired Fire and Police Association in 1978.

Awarded the Certificate of Appreciation by the Chinatown Service Center for dedicated services to the community in 1977 and 1985.

Awarded the Certificate of Merit from the City of Los Angeles Human Relations Commission for volunteer community service in 1977 and 1982.

Charter member of the Delta Theta Phi law fraternity, McComb Senate, at Southwestern School of Law in 1970.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Answer:

Sat on assignment as Justice Pro Tem, California Supreme Court, October 1985.

Los Angeles Superior Court representative to the Child Sexual Abuse Crisis Center, an adjunct of the Criminal Justice Coordination Committee, County of Los Angeles from 1985 to present.

Member of CJER Planning Committee for Vietnam Veterans Post-Traumatic Stress Disorder Project from 1985 to present.

Member of the Los Angeles Superior Court's Private Investigator Committee from 1985 to 1986.

Sat on assignment as Justice Pro Tem, Court of Appeal, Second Appellate District, Division Seven, March 1984 to May 1984.

Member of the Los Angeles Municipal Court Standing Committees on Budget, Legislation, and Facilities, in 1984.

Member of the Los Angeles Municipal Court Judges' Executive Committee and Personnel Committee, 1983.

Member of the California Asian Judges Association from 1982 to present.

Member of the Los Angeles County Municipal Court Judges Association from 1982 to 1984.

CJER member from 1982 to present, and California Trial Judicial College graduate in 1982 and 1984.

Member of the California Judges Association from 1982 to present; Historical Committee from 1982 to 1984.

Member of the California State Bar from 1972 to 1981.

Member of the California Assembly Los Angeles Court Improvement Committee in 1979-1980.

Member of the Los Angeles County Bar Association, 1972 to 1985.

Charter member of the Southern California Chinese Lawyers' Association in 1976. Program chairman/executive vice president, 1976. Executive vice president, 1977. President-elect, 1978. President, 1979.

Delegate to the Conference of Delegates at the 1978 Annual Meeting of the State Bar in San Francisco, and a Delegate to the 1979 Annual Meeting in Los Angeles.

Member of the Minority Bar Association of Southern California from 1977 to 1982.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Answer: None.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Answer: Supreme Court of the State of California; admitted January 5, 1972. United States District Court; admitted January 12, 1972. (Both are inactive from February 1982 after becoming a Judge).

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Answer: None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Answer: Excellent. I had my last physical examination on September 3, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Answer: I am presently a Los Angeles Superior Court Judge. I was appointed to this position in August 1984 and was unopposed in the June 1986 election. Previously, I was appointed to the Los Angeles Municipal Court as a Judge in February 1982 and was unopposed in the June 1984 election.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Answer:

(1) While assigned as a Justice Pro Tem, Court of Appeal, Second Appellate District, Division Seven, from March 1984 to May 1984, I wrote five opinions in the cases of: People vs. Thomas Chandler Parsons, 2d Crim.No. 44212, 156 CA3d 1165; Vernon Merle Hildebrandt vs. Director of Director of Motor Vehicles, No. B001219; People vs. Alex Conedy, 2d Crim.No. 44352; People vs. Felipe DeJesus Medrano, 2d Crim.No. 44252; and People vs. James Lloyd, Jr., 2d Crim.No. 43932.

(2) None.

(3) None.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Answer: Yes. I was appointed to the Los Angeles Fire and Police Pension Commission on December 1976, and served to January 1982. As a general rule, the Board of Pension Commissioners met weekly to take action on routine department business, to make investment decisions, and to hear disability cases to determine whether a disability exists, the service connection of the disability, and the degree of disability for the Los Angeles Fire and Police personnel.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:

2. whether you practiced alone, and if so, the addresses and dates:

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

Answer:

a. 1. No.

2. No.

3. I was in practice as an attorney with Avans & Lew, 1640 W. Third Street, Los Angeles, CA 90017, from 1974 to 1981. From 1972 to 1974, I was employed as a Deputy City Attorney with the Los Angeles City Attorney's Office, City Hall, Los Angeles, CA 90012.

b. 1. Prior to being a Judge, between the dates of April 1974 and January 1982, I was in the general practice of law. I started my legal career in the Los Angeles City Attorney's Office from January 1972 to April 1974, first as a prosecutor in the Criminal Division and then as a plaintiff's and defendant's attorney in the Civil Liability Division representing the city of Los Angeles and its employees.

2. While in private practice, the general character of the clients ranged from a low income person to insurance companies and small businesses. The practice emphasized business, real estate, personal injury litigation, family law, criminal, and immigration matters.

c. 1. I appeared in court regularly.

2. (a) 1%

(b) 89%

(c) 10%

3. (a) 30%

   (b) 70%

4. I would estimate over 250.

5. (a) 50%

   (b) 50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:
    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Answer:

(1) People vs. Theodore Capoferi and Delia Maria Capoferi, Los Angeles Superior Court case no. A757433. I was the trial judge in a jury trial conducted in Department 116 from January 22, 1986 to March 28, 1986. The prosecutor was Deputy District Attorney Steven Morgan, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant Theodore Capoferi was represented by Deputy Public Defender Michael Gottlieb, 210 W. Temple Street, Los Angeles, CA 90012 (213) 974-2811, and defendant Delia Maria Capoferi was represented by John R. Johnson, 5358 Sunlight Place, Los Angeles, CA 90016, (213)475-0611.

The defendants were husband and wife and of the Krishna belief. While taking care of a Krishna day care center, they were charged with 13 counts of child molestation. After a very stressful trial for the attorneys, Theodore Cappferi was convicted and Delia Maria Capoferi was acquitted. It was later learned that there were many more uncharged victims who suffered very severe injuries.

(2) People vs. Anderson Hawthorne, Jr., Los Angeles Superior Court case no. A386104. I was the trial judge in a jury trial conducted in Department 116, from October 2, 1985 to January 21, 1986. The prosecutor was Deputy District Attorney Barbara Murphy, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant was represented by Albert DeBlanc and Anthony Alexander, 3200 Wilshire Blvd., Suite 1330, Los Angeles, CA 90010, (213)384-8773.

The defendant was charged with two counts of murder, three counts of attempted murder, and other charges. This was my first capital case. The defendant was found guilty and sentenced to death. Appeal is now pending with the California Supreme Court.

(3) People vs. James D. Hawkins II, Los Angeles Superior Court case no. A751277. I was the trial judge in a jury trial conducted in Department 116 from June 5, 1985 to September 9, 1985. The prosecutor was Deputy District Attorney Harvey Giss, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant was represented by Stephen L.

Schwartz, 10100 Santa Monica Blvd., 25th floor, Los Angeles, CA 90067, (213)551-0500, and Janis A. Rader, 1685 Main Street, SArta Monica, CA 90401, (213)483-1961.

The defendant was charged with the murder of a gang member which resulted in gang reprisals on the defendant's family and giving rise to national media attention. The heated trial actually began with many pretrial motions in April 1985 and ended with a manslaughter conviction and sentence. The publicity on this case was further heightened when the defendant escaped after his sentence.

(4) People vs. Jimmy Delor Lewis, Los Angeles Superior Court case no. A394507. I was the trial judge in a jury trial from March 26, 1985 to April 12, 1985. The prosecutor was Deputy District Attorney Janet Fox, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant was represented by Richard Leonard, 5107 Crenshaw Blvd., Los Angeles, CA 90043, (213)861-7437.

The defendant was charged with a drug related murder. After an intense trial with very substantial evidence against the defendant, the jury acquitted the defendant. The verdict was a total surprise to everyone in court inasmuch as the defendant offered to plead guilty to second degree murder before the trial started.

(5) People vs. Joseph Mitchell, Los Angeles Superior Court case no. A752979. I was the trial judge in a jury trial conducted in Department 116 from March 6, 1985 to March 22, 1985. The prosecutor was Deputy District Attorney Marc Merrick, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant was represented by Deputy Public Defender Leslie Falick, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-2811.

The defendant was a 19 year old Canadian who was charged with a homosexual killing of a film studio executive after the preview screening of "Indiana Jones and the Temple of Doom." This case was significant because the jury was able to see a well documented psychological history of the defendant from age six to the time of the killing. The defendant was convicted of murder and sentenced.

(6) Howard Secretan vs. Brutoco Engineering Co. Corp and State of California, Los Angeles Superior Court case no. NOC3021. I was the trial judge in a jury trial conducted in Department NVF from September 17, 1984 to October 12, 1984. The plaintiff was represented by Louis I. Bell, 44421 N. Tenth Street, Suite C., Lancaster, CA 93539, (805)942-0483. Defendant Brutoco was represented by William F. Nimmo, who was with the office of Jack D. Bandy, 3130 Wilshire, Suite 509, Los Angeles, CA 90010, (213)381-6611, and defendant State of California was represented by David R. Simmes, Department of Transportation, 1605 W. Olympic Blvd., Suite 700, Los Angeles, CA 90015, (213)736-3800.

The plaintiff alleged that he received injuries in a motorcycle accident due to a defective roadway on the Antelope Valley Freeway, State Highway 14. This was my first civil jury trial as a superior court judge. The trial resulted in a defense verdict.

(7) People vs. Kenneth Gay, Raynard Cummings, Pamela Cummings, and Robin Gay, Los Angeles Superior Court Grand Jury Indictment no. A392702. I presided over the preliminary hearing in Division 132, August 22, 1983. The Deputy District Attorney was John Watson, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defense attorneys were: Edward Rucker, 490 W. Fair Oaks Avenue, Pasadena, CA 91105, (818)793-8701; Elmer Docken, 19839 Wilby Way, Canoga Park, CA 91306, (818)347-4416; Clarence Loffarelli, 14328 Victory Blvd., Suite 101, Van Nuys, CA 91401, (818)781-0550; and, Daye Shinn,

13450 Maxella Ave, Suite G-275, Marina Del Rey, CA 90292, (213)821-5074.

The defendants were charged in a 24 count indictment for the 1983 killing of a Medal of Valor winner Los Angeles Police Officer Paul L. Verna in Lake View Terrace after a routine traffic stop. After lengthy prehearing motions, the preliminary hearing estimated to be 6 to 7 weeks long, was completed in 8 court days with 41 witnesses testifying, 71 exhibits received into evidence, and 15 stipulations entered into by counsels. The preliminary hearing was conducted in a high security environment and while under the constant media coverage of the proceedings. The defendants were bound over for trial.

(8) People vs. Arody Ramos Tome and Hugo Roman Lopez, Los Angeles Municipal Court case no. A803876. The preliminary hearing was heard in Division 120 before me as the magistrate in 1983. The people was represented by Deputy District Attorney Stan Weissberg, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defense attorneys were Richard Plotin, 6259 Van Nuys Blvd., Suite 103, Van Nuys, CA 91401, (818)989-7311, and Deputy Public Defender Mark Lessem, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-2811.

These two defendants were charged with 15 felony counts of murder, attempted murder, kidnap, and robbery. The defendants, Cuban refugees, were on a crime spree terrorizing the San Fernando valley. They were ultimately apprehended and brought to Court. After the preliminary hearing, they were held to answer for trial in Superior Court.

(9) People vs. Jean Barbar, Los Angeles Municipal Court case no. 686624. I was the trial judge in the jury trial conducted in Division 107, May 13, 1982. The people was represented by Deputy City Attorney Steve Marcus, now with the District Attorney's Office, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-3511. The defendant was represented by Deputy Public Defender William Misener, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-2811.

The defendant was charged with 3 counts of battery against 3 different victims. The defendant and the victims were acquaintances of one another and were all deaf mutes requiring sign language interpreters. The defendant was an apparent karate expert and the incident occurred after a neighborhood dispute over personal property. After 3 days of jury trial, the trial was terminated with a plea to disturbing the peace. This case was later tried as a civil case in "People's Court" on television.

(10) People vs. Wayne Patrick McClain, Los Angeles Municipal Court case no. 668801. I was the trial judge in the jury trial conducted in Division 107 from March 9, 1982 to March 16, 1982. The prosecutor was Deputy City Attorney Sue Frauens, 200 N. Main Street, Suite 1700, Los Angeles, CA 90012, (213)485-4515. The defendant was represented by attorney Gerald T. Richardson, now a Depty Public Defender, 210 W. Temple Street, Los Angeles, CA 90012, (213)974-2811.

The defendant was charged with driving while under the influence of an alcoholic beverage and he had blood alcohol readings of .15, .18, and .15. The defense was that there were errors in the GCI readings and that the defendant's symtoms were unreliable because of injuries he received in an earlier fight that day. This was the first jury trial I presided over. After a six day trial, the jury was hung 11 to 1 for guilty. At retrial the defendant entered a plea.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation.

Describe the nature of your participation in the matter. (note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Answer: Same as answer number 18, above.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   Answer: None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   Answer: I have no conflict of interests. If I had any potential conflict of interest, I would sever myself from that conflict and also advise the litigants of my position.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   Answer: No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Answer: No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Answer: Not applicable.

6. Please complete the attached financial net worth statement in detail. (add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	23000	00	
U.S. Government securities—add schedule	–		
Listed securities—add schedule	–		
Unlisted securities—add schedule	–		
Accounts and notes receivable:	–		
Due from relatives and friends			
Due from others	–		
Doubtful	–		
Real estate owned—add schedule #1	650000	00	
Real estate mortgages receivable	–		
Autos and other personal property	40000	00	
Cash value—life insurance Sch#2	–		
Other assets—itemize:	–		
Judge's Retirement -	20000	00	
Contributions	–		
	–		
	–		
Total assets	733000	00	

LIABILITIES			
Notes payable to banks—secured Sch#3	7800	00	
Notes payable to banks—unsecured	–		
Notes payable to relatives Sch#4	11500	00	
Notes payable to others	–		
Accounts and bills due	800	00	
Unpaid income tax	–		
Other unpaid tax and interest	–		
Real estate mortgages payable—add schedule #5	282000	00	
Chattel mortgages and other liens payable	–		
Other debts—itemize:	–		
	–		
	–		
	–		
	–		
Total liabilities	302100	00	
Net worth	430900	00	
Total liabilities and net worth	733000	00	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	None		
On leases or contracts	None		
Legal Claims	None		
Provision for Federal Income Tax	None		
Other special debt	None		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

ASSETS - Schedule #1: (Real Estate owned)

(1) Residence, 9454 Gierson Ave, Chatsworth, CA	350,000
(2) 25% interest., 716-720 W. Emerson, Monterey Park, CA	125,000
(3) 25% interest., 764-770 Ceres, L. A., CA	150,000
(4) 25% interest., 3954 Hobart, L. A., CA	10,000
(5) 1/9 interest., unimproved lots, Chavez Ravine, L.A.	15,000
	650,000

ASSETS - Schedule #2: (Autos and other property)

1986 Ford Escort	7,000
1985 Lincoln Towncar	8,000
1978 Cadillac Elegante	5,000
household furniture and furnishings	20,000
	40,000

LIABILITIES - Schedule #3: (Secured Notes to bank)

Ford Motor Credit Company	7,800
	7,800

LIABILITIES - Schedule #4: (Notes payable to relatives)

Loren Lew, brother	11,500
	11,500

LIABILITIES - Schedule #5: (Real estate mortgages)

Gibralter Saving and Loan	200,000
Hazel Long	57,000
Monterey Park Savings	25,000
	282,000

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Answer: I do not intend to use the judiciary as a forum to advocate any particular position. As a Federal judge, I intend to continue to do that which I have done the last five years as a State Court judge. Litigants that are properly before the court will have their cases heard and a decision according to our laws will be made.

2. **What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.**

Answer: As a State Court judge the last five years, I have dispensed justice fairly to everyone. While in the private practice from 1974 to 1981, I devoted at least 10% of my time to free or reduced fees to indigents. And, as a member of the Southern California Chinese Lawyer's Association, I volunteered time to the pro bono community legal clinic on saturdays.

From 1977 to 1981, I served as legal advisor to the Gee Poy Kuo Family Association and the San Fernando Valley Chinese Cultural Association, both are non-profit corporations.

In 1975, I incorporated the Chinatown Service Center as a non-profit corporation. I served as a member of the Board of Directors and legal advisor. Pro bono legal services were extended not only to the organization, but also to the people it served, from 1975 to 1981.

Rec'd-2/6/87
RJ.

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
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Chicago, Illinois 60611
(312) 988-5000

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Lincoln, NE 68501

NINTH CIRCUIT
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1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
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P.O. Box 78
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DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Bierbower
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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: RONALD S. W. LEW
United States District Court
Central District of California

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Ronald S. W. Lew for appointment as Judge of the United States District Court for the Central District of California.

A substantial majority of our Committee is of the opinion that Judge Lew is "Qualified" for this appointment. The minority found him to be "Well Qualified."

Sincerely,

Robt B Fiske Jr
ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

SOUTHERN CALIFORNIA
CHINESE LAWYERS' ASSOCIATION
LOS ANGELES COUNTY CHAPTER
PRESIDENT'S MAILING ADDRESS
1210 S. SHENANDOAH STREET
NUMBER 203
LOS ANGELES, CALIFORNIA 90035

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February 5, 1987

The Honorable Patrick J. Leahy
Senate Judiciary Committee
SD-224
Washington, D. C. 20510

Re: Nomination of Ronald S. W. Lew for United States District Judge

Dear Senator Leahy:

This letter is written on behalf of the Southern California Chinese Lawyers' Association in support of the nomination by President Reagan of Ronald S. W. Lew for appointment as a United States District Judge for the United States District Court, Central District of California. As an association of attorneys interested in promoting the interests and affairs of Asian-Americans in the greater Los Angeles area, the Southern California Chinese Lawyers' Association is very familiar with Judge Lew's background and his qualifications for an appointment to the federal bench in Los Angeles. Thus, this letter will set forth information which we believe may be helpful to your assessment of Judge Lew's qualifications to be a federal judge.

First, from a professional standpoint, Judge Lew's credentials are impeccable. A former prosecutor with the City Attorney's Office in Los Angeles, Judge Lew was an experienced trial attorney and litigator prior to his appointment to the state court bench. Throughout his distinguished career, Judge Lew has made his mark as a hardworking, aggressive, yet fair lawyer who strives for perfection and maintains the highest standards of excellence in our profession. Judge Lew's blend of experience, drawn also from his service as a Municipal and Superior Court Judge, thus makes him the perfect candidate for appointment to the federal bench.

In addition, Judge Lew was one of the co-founders, and a past president of the Southern California Chinese Lawyers' Association. Under his stewardship, our Association developed into one of the most active bars in the Southern California area. He has continued his leadership, and has solidified his position as a role model for other Asian-American attorneys through his selfless and active participation in a number of community and bar association-related activities.

In yet another light, Judge Lew is known to many as a fine human being with excellent judgment and a deep concern for his fellow citizens. Indeed, a remarkable fact about Judge Lew is that he is well-respected and admired by conservatives, liberals, ethnic minorities, as well as Democrats and Republicans. A system which focuses upon merit and accomplishment is thus enhanced through Judge Lew's nomination to be a United States District Judge in Los Angeles.

We therefore urge you to vote in support of the President's nomination of Ronald S. W. Lew to be the next United States District Judge for the Central District of California. Your support will reflect an appreciation of Judge Lew's outstanding qualifications and the long overdue appointment of a Chinese-American lawyer to be a member of the federal district court bench.

Very truly yours,

Brian A. Sun
President, Southern California
Chinese Lawyers' Association

BAS:jal

Rec'd - 4/16

SFVBA
SAN FERNANDO VALLEY BAR ASSOCIATION
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April 8, 1987

Senator Joseph R. Biden, Jr.
Chairman, Senate Judiciary Committee
Washington, D.C. 20510

SUBJECT: NOMINATION of the HON. RONALD S.W. LEW to the FEDERAL DISTRICT COURT BENCH

Dear Senator Biden:

We are enclosing herein for your review a resolution, which was approved unanimously by the Board of Trustees of the San Fernando Valley Bar Association, endorsing the nomination of the Honorable Ronald S.W. Lew for appointment to the Federal District Court for the Central District of the State of California.

Our Bar Association is one of the largest independent bars in the State of California, and this endorsement represents our respect and honor for Judge Lew, who has served as a member of our local judiciary for many years, and as an active member of our community.

It is important to note that this is the first time that our Bar Association, which represents a broad cross section of religious, ethnic, and political views, has presented a resolution such as this. We encourage the expeditious confirmation of Judge Lew by your committee. We are confident that he will serve as a highly capable and distinguished member of the Federal Court judiciary.

We ask that this resolution be brought to the attention of your Senate Judiciary Committee, and that it be incorporated into the Congressional record.

We appreciate your courtesy and consideration in this matter.

Very truly yours,

HAIG KEHIAYAN, President
SAN FERNANDO VALLEY BAR ASSOCIATION

HK/sk

cc: Senate Judiciary Committee Members

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. Biographical Information (Public)

1. Full Name (include any former names used).

Bohdan A. Futey
Bohdan Futey
Bohdan Futej

2. Address: List current place of residence and office address (es).

Ohio residence:

D.C. residence:

Business: Foreign Claims Settlement Commission
1111 20th Street, N.W. Suite 405
Washington, D.C. 20579

3. Date and place of birth:

June 28, 1939 in Ukraine

4. Marital Status (include maiden name of wife) List spouse's occupation, employer's name and business address (es).

Myra Futey (Fur) Assistant Adminstrator of Personnel for the City of Cleveland, Cleveland, Ohio

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Western Reserve University, Cleveland, Ohio
1958 - 1962
B.A. degree - Summer of 1962

Western Reserve University, Cleveland, Ohio
1962 - 1964
M.A. degree - September 1964

Cleveland Marshall Law School, Cleveland, Ohio
1964 - 1968
J.D. degree - June 1968

6. **Employment Record:** List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, non-profit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1962-1966	Glenville High School in Ohio - teacher
1966-1968	Brecksville Board of Education, Brecksville, Ohio - instructor
1968-1972	Futey & Rakowsky Law Firm, Parma, Ohio - law partner
1972-1974	Chief Assistant Police Prosecutor, City of Cleveland
1974-1975	Executive Assistant to the Mayor, City of Cleveland
1975-1984	Bazarko, Futey & Oryshkewych Law Firm, Parma, Ohio - law partner
1984-Present	Foreign Claims Settlement Commission of the United States, Washington, D.C. - Chairman

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholorships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

1983	Certificate of Recognition by Mayor Voinovich, City of Cleveland
1984	Ohio State Legislature Certificate as Outstanding Ohioan

9. Bar Association: List all bar associations, legal or judicial - related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

The Parma Bar Association - member

The Bar Association of Greater Cleveland - member

The District of Columbia Bar Association - member

Ukrainian American Bar Association - former Governor and President, 1984 to 1986; presently, a member

American Bar Association (membership application submitted Dec. 1986)

10. Other memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.)

I do not belong to any organizations which are active in lobbying before public bodies.

I am a member of two fraternal organizations:

Ukrainian National Association and Providence Association of Ukrainian Catholics in America.

I am also a member of one professional organization:

The Washington Group - an association of Ukrainian-American professionals.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

The Supreme Court of Ohio - November 2, 1968

The District Court for the Northern District of Ohio-December 16, 1969

District of Columbia Court of Appeals - January 3, 1986

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. October 24, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such positions were elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations:

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State chronologically any unsuccessful candidacies for elective public office.

Both of these were appointed positions:

1972-1974	Chief Assistant Police Prosecutor for the City of Cleveland, Cleveland, Ohio
1974-1975	Executive Assistant to the Mayor, City of Cleveland

Unsuccessful candidate for the U.S. House of Representatives in the 23rd District of Ohio in 1974 and an unsuccessful candidate for Mayor of Parma, Ohio in 1975.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.

Not applicable

2. whether you practiced alone, and if so, the address and dates.

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

1968-1972	Partner in the law firm of Futey & Rakowsky 5691 State Road, Parma, Ohio 44134
1972-1974	Chief Assistant Police Prosecutor for the City of Cleveland
1975-1984	Partner in the law firm of Bazarko, Futey & Oryshkewych, 5566 Pearl Road, Parma, OH 44129
1984-Present	Chairman of the Foreign Claims Settlement Commission, 1111 20th Street, N.W. #405, Washington, D.C. 20579

b.1. what has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1968-1972	General practice with emphasis on Cognovit judgements and foreclosures (while representing a financial institution), also Probate practice. During the same time period, served on the Arbitration Panel, arbitrating cases in the Cleveland Municipal Court and the Court of Common Pleas of Cuyahoga County, Ohio. This program was organized by the Bar Association of Greater Cleveland in order to alleviate the heavy docket in both courts.

1972-1974	Chief Assistant Police Prosecutor for the City of Cleveland, handling of felony charges and supervising misdemeanor trials in court.
1974-1975	Executive Assistant to the Mayor, in addition to administrative duties, supervised the reorganization of the Office of Industrial Claims (workmen's compensation)
1975-1984	General practice - special areas: criminal, immigration, workmen's compensation law and contracts. Also, a considerable number of foreclosures representing Federal National Mortgage Association and evictions representing the Veterans Administration.
1984-Present	Chairman of the Foreign Claims Settlement Commission, appointed by President Reagan and confirmed by the U.S. Senate. The Commission is a quasi-judicial federal agency which has been authorized over the years by specific legislation to determine claims of United States nationals for loss of property in specific foreign countries. The Chairman and Commissioners as a body are responsible for the adjudication of claims and the issuance of decisions thereon. They decide on questions of law and fact. The Chairman conducts most of the hearings on appeal.

c.1. did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Regularly, in private practice. After May 1984, my experience as Chairman of the Foreign Claims Settlement Commission has been in a quasi-judicial capacity.

2. what percentage of these appearances was in

(a) federal courts

5%

(b) state courts of record

80%

(c) other courts

15% administrative agencies

3. what percentage of your litigation was

(a) civil

60%

(b) criminal

40%

4. state the number of cases in courts of record you tried to verdict or judgement (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   an average of 15 cases per year. Approximately 80% of these were as sole counsel and 20% as co-counsel.

5. what percentage of these trials was

   (a) jury

   10%

   (b) non-jury

   90%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    (a) the date of representation;

    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and

    (c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Since May 1984, I have no longer been associated with my former law firm; all my files stayed with the firm in Parma, Ohio. In recalling some of the cases, I would like to point out that I have had substantial trial experience.

As Chief Assistant Police Prosecutor I had almost daily appearances in Court. Later, in private practice, I did criminal defense litigation, including representation in homicide cases.

In State of Ohio vs. Michael Ledger, I was assigned co-counsel for the defendant, the other attorney was Jerry Milano (Standard Building, Cleveland, Ohio 44114 (216) 696-6996). The case was tried in the Court of Common Pleas of Cuyahoga County, Ohio (1977) before a jury with Judge James Kilcoyne presiding. The defendant was charged with the unlawful and intentional killing by use of a fire arm (aggravated murder). The predominant issue raised by the defense during the two weeks trial was the procedure used in identifying the defendant. We claimed that this procedure was so impermissably suggestive as to create the likelihood of irreparable mis-identification. The Court disagreed and the jury returned the guilty verdict. During the pre-trial and trial stages of this case, I was responsible for at least half of the pleadings on behalf of the defendant, including the various motions, some investigation; voir dire and examination and cross examination of witnesses. Being one of my first cases of this nature, even though in a losing proposition, it will always be important to me.

In State of Ohio vs. Bak (Court of Common Pleas, Cuyahoga County, Ohio) 1984, the defendant was indicted for involuntary manslaughter, in that he caused the death of an elderly man, and such death was the proximate result of defendant committing a misdemeanor. The case presented the issue of whether a prior written statement of a witness obtained while in police custody should be suppressed if the witness subsequently testifies at the trial and changes his testimony (i.e. explaining the circumstances of the prior written statement). Judge Frederick Coleman allowed the statement into evidence over the objections of counsel for the defendant, and the jury returned the verdict of guilty. Attorney Nicholas A. Bucur (614 Superior Avenue, N.W. Cleveland, OH 44113 (216)781-6676) and I represented the defendant Roman Bak. The significance of our initial defense arguments for suppression found merit in the Court of Appeals when the case was appealed. The Court of Appeals suppressed the prior written statement and the case was dismissed. (Note: defendant had different representation at this proceeding.)

In this case along with Attorney Nicholas Bucur, I was responsible for some motions, voir dire, examination and cross examination of witnesses. Since defendant and witnesses were of Slavic background, I conducted a number of depositions, did some investigation and interpreting.

In addition, I received assignments from the Court of Common Pleas to represent indigent clients in all ranges of felony cases, mainly burglary, armed robbery and rape. Most of these cases were resolved through plea bargaining, but a good number were tried before a judge with or without jury.

In civil cases my trial experience included jury and jury and non-jury trial work in real estate matters, contracts, foreclosures, eviction, actions for specific performance and divorce cases.

In Mural vs. Perez (Court of Common Pleas, Medina County, Ohio) 1976. This was an action to collect on a judgement obtained in a municipal court from another county. I represented the Plaintiff and John Calandra (800 Standard Building, Cleveland, OH 44113, (216) 861-3000) represented the defendant therein. The main issue dealt with service. Counsel for Plaintiff argued that service at the residence of the defendant received by and signed for by a minor son was proper service on the defendant. The Court agreed and rendered judgement for the Plaintiff. I believe this was one of the precedent cases to be decided on the issue of service under the new Rules of Civil Procedure in the State of Ohio. I was the sole counsel representing the Plaintiff responsible for all pleadings, examination and cross examination of witnesses and all arguments before the Court.

Rodriguez vs. Chalmers, et al. (Jury trial in the Court of Common Pleas, Cuyahoga County, Ohio, before Judge Bernard Friedman in the fall of 1983). I represented Cleveland Selfreliance Credit Union, Inc. as a third party defendant. The Credit Union sold to Chalmers a parcel of land containing an easement and Treatment Plant operated and maintained by the County. Chalmers resold the same parcel of land to Rodriguez. After a few years, Rodriguez' attorney, Stephen Wallace (3651 Gridley Road, Cleveland, OH 44122, (216) 295-0370) sued Chalmers alleging that the Warranty Deed did not contain any exceptions, i.e. limitations, as to the Treatment Plant and therefore, he (Rodriguez) received less than he bargained for in the contract. Chalmers' attorney, Allen Kancenjar (5241 Broadview Road, Parma, OH 44134, (216)398-9870) in turn sued the Credit Union as the original seller in this matter. During the trial, attorneys for the defendants argued that Plaintiff had personally inspected the land, had full knowledge of the Treatment Plant being on the premises and further all other documents, including the purchase agreement, made specific references to the Treatment Plant and its operation by the County. In other words, Rodriguez was now estopped from claiming lack of knowledge. The case, however, never went to the jury. At the conclusion of our case, we, attorneys for the defendants moved for a direct verdict, and so did the attorneys for the Plantiff. Judge Bernard Friedman removed the case from the jury and ruled in favor of the defendants. In my opinion this case had no merits ab initio. Yet under our democratic system every person is entitled to his day in court and therefore, by exercising this option we are faced with overcrowded dockets and obviously frivolous actions being filed. As sole counsel for the credit union, I was responsible for all the pleadings and litigation proceedings.

In immigration matters, I appeared in several instances before the Immigration Judge in Cleveland, Ohio. In Re Hernandez, an immigration case heard by Judge Adolph Angellili in Cleveland, Ohio (1983), I represented Mr. Hernandez in deportation proceedings. The respondent was charged with remaining in the United States for a longer time than permitted. Also, at issue was his marital status. Based on my arguments and evidence submitted, Judge Angellili granted the motion for termination of deportation proceedings. Later, the petition for adjustment of status filed on Mr. Hernandez' behalf by his American wife was granted. I was the sole counsel for Mr. Hernandez representing him at all stages of the proceedings. Mr. Russell Ezolt was the Chief Officer for INS.

The following are names of several attorneys in the Cleveland area that I have litigated cases with or against: Bill Hohmann, Paul Mancino, Harvey Bruner, Nicholas A. Bucur, Andrew Boyko, Jerry Milano, Andrew Lucso, Paul Cassidy, Allen Kacenjar, John Calandra, Thomas B. Wilbur.

Also, the following are names of Judges of Ohio and federal courts before whom I have practiced and who I believe are acquainted with my reputation as a legal practitioner: Herbert Whiting, Patrick F. Gallagher, James Kilcoyne, Frank G. O'Bell, Frederick Coleman, Frank Celebrezze, Alvin Krenzler, George Spanagel, Gertrude Polcar, James Hennessey, C. Ellen Conally, Blanche Krupansky, Ann Dyke, Terrence O'Donnell and Bernard Friedman.

During my tenure as Chairman of the Foreign Claims Settlement Commission, my experience has been quasi judicial. I have actively participated in the preparation, review and adjudication of claims of Czechoslovak and Vietnamese programs, which the Commission has recently concluded. Presently the Commission is adjudicating the Ethiopian Claims Program. My participation includes continuous consultation with staff attorneys, review of their work as to the evidence and applicability of the law of each claim and the rendering of a final decision in consultation with the other members of the Commission.

The following are a few examples of summaries of the substance of claim adjudications.

In the claim of Jacob Michael (Dec. CZ-2-1130) the Commission determined that claimant had established a valid inter vivos transfer of real property despite the fact that it had not been recorded in the land records where claimant met four conditions: (1) the transfer was in writing; (2) the language in the document and subsequent conduct of parties demonstrated an unequivical intention to transfer and divest all right, title, and interest in the property; (3) there was a delivery of the document to the transferred; and(4) a reason for the non-recordation was provided.

In the claim of Elizabeth Surak (Dec. CZ-2-1289) the Commission held that property of claimant's deceased husband taken as part of a penalty for violations of Czechoslovak criminal law was with the sovereign authority of the state and did not constitute a compensable claim, however, where claimant was required to sign over all her interest in her property to obtain a valid exit visa, the Commission found this was in violation of international standards and constituted a compensable loss.

In the claim of Betty J. Mitchell (Dec. V-0259) the Commission found that claimant was entitled to an award for personal property which she was forced to abandon during the communist conquest of South Vietnam. The Commission through its own research found that it was the clear policy of communist authorities to treat property of departed Americans as "property of the people" and take it under government control. This was confirmed by various decrees which had been issued and by eyewitness accounts and was sufficient to allow the Commission to presume that the personal property had been taken.

In the claim of Ba Cheque Corporation (Dec. V-0207) the Commission found that the claimant was entitled to compensation for blank travelers checks left behind in Vietnam at the time of the evacuation which had been subsequently negotiated under Vietnamese government authority and for which claimant was required to make a payment. The Commission denied that part of the claim for other outstanding checks which had not been presented for payment prior to the date of passage of the claim statute.

In the claim of Pearl S. Buck Foundation Inc. (Dec. V-0439) the Commission found that the regulations concerning the use of bank accounts imposed by the communist regime were such as to exclude any use or benefits of the accounts to the United States owner and constituted a de facto taking of the account.

In the claim Ida Hersch (CZ-2-0946) where a request for information from the Czech government had not received a response at the time the Commission had issued a proposed decision denying the claim for lack of evidence, the Commission rejected claimant's argument that the Commission action was unconstitutional because the claims agreement with Czechoslovakia, containing a provision for information to be given by the latter in response to request from the Commission, was a "treaty" therefore the "supreme law of the land". The Commission held that the agreement with Czechoslovakia did not appear to be a treaty but even if it were, there was nothing therein contained which prevented the Congress from establishing a time limitation for the completion for the Commission's affairs in the Czech program.

In the claim of Caltex (Dec. V-0435) the Commission agreed with claimant's assertion that the value of its petroleum distribution company in Vietnam should be determined by its balance sheet, with a depreciated value of physical assets being increased to the extent that replacement cost had increased and that tangible items fully depreciated should be valued at 20% of the assets replacement cost.

In the claim of American International Group Inc. (Dec. V-0404) the Commission found that where a service industry in the nature of an insurance agency was taken over the claimant was entitled to an award based upon the "going concern value" of the agency. The Commission considered previous net income of the agency and the discounted value of future income in determining such value.

In the claim of Joint Venture of Pectin Company and Vietnam City Service Incorporated (Dec. V-0425) the Commission determined that a joint venture could be an eligible claimant under the statutory definition of an "other business entity". Where it was established, following objection and hearing, that the joint venture was created in the state of Texas and that more than 50% of the beneficial interest of the joint venture was indirectly held by nationals of the United States, the joint venure could qualify as a United States national despite the fact that one of the two corporations which formed the joint venture did not itself qualify as a United States national, also the Commission held that a petroleum exploration concession constituted a confiscation of property and that damages could be measured by the capital investments made by claimant.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege).

Legal Activities within the Foreign Claims Settlement Commission:

1. Reviewed hundreds of legal memoranda prepared by staff attorneys and participated in the adjudication of hundreds of claims involving questions of federal, state and foreign law.
2. Analyzed proposed legislation and represented Federal agency at Congressional hearings held on the proposed law.
3. Analyzed and recommended action to the President on legislation enacted by Congress.
4. Developed and issued Federal agency regulations implementing Federal statutory programs.
5. Personally conducted numerous oral hearings on behalf of Federal agency, taking testimony and ruling on evidence proffered and motions.

II. Financial Data and Conflict of Interest (Public)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   I have a verbal agreement with my former law partners to return to the law firm. However, upon confirmation by the Senate to the U.S. Claims Court, this agreement will be terminated.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   If there would be any appearance of conflict of interest, I would recuse myself from hearing the case.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title, and responsiblities.

   Nationalities Coordinator in Ohio, Reagan for President, 1979-1980
   State Coordinator, Reagan/Bush Nationalities Division, 1980
   National Chairman of Ukrainian Americans, Reagan/Bush 1984

5. If applicable, please describe the arrangments you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangments have you made to be compensated for your work on pending litigation?

   Please see answer to Question #1.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

   Please see attached.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	20,000	00	
U.S. Government securities—add schedule "EE" series	1,800	00	
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	910,000	00	
Real estate mortgages receivable			
Autos and other personal property	15,000	00	
Cash value—life insurance	4,000	00	
Other assets—itemize:			
BFKMW, Inc. (real estate inv)	20,000	00	
5531 Pearl Rd. Inc. (Business Investment)	10,000	00	
IRA & PERS Pension	34,000	00	
Total assets	1014,800	00	

LIABILITIES			
Notes payable to banks—secured	7,000	00	
Notes payable to banks—unsecured	0		
Notes payable to relatives	0		
Notes payable to others	0		
Accounts and bills due	5,000	00	
Unpaid income tax	0		
Other unpaid tax and interest	0		
Real estate mortgages payable—add schedule	429,000	00	
Chattel mortgages and other liens payable	0		
Other debts—itemize:			
Tuition for schools	9,000	00	
Total liabilities	450,000	00	
Net worth	564,000	00	
Total liabilities and net worth	1014,800	00	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

REAL ESTATE MORTGAGE PAYABLE

	Amount
Cleveland Selfreliance Credit Union, Inc. 6108 State Road Parma, Ohio 44134	
a. First Mortgage on Residence House	$25,000
b. Second Mortgage on Residence House	$29,000
c. First Mortgage on BFO Properties	$27,000
Third Federal Savings and Loan Association of Cleveland 5950 Ridge Road Parma, Ohio 44129	
First Mortgage on Crestway Manor Apt.	$213,000
Maria Futej Yurkiw 5963 State Road Parma, Ohio 44134	
Second Mortgage on Crestway Manor Apts.	$135,000
Total	$429,000

REAL ESTATE OWNED

	Value
Residence House 8619 Whippoorwill Lane Parma, Ohio 44130	$140,000
Crestway Manor Apartments (36 units) 5840-5850 W. 130th Street Brook Park, Ohio 44142	$700,000
BFO Properties (Office Building) 5566 Pearl Road Parma, Ohio 44129	$ 50,000
Five Acres of Land Canfield, Ohio	$ 5,000
One Lot in Sarasota County, Florida	$ 5,000
One Lot in Charlotte County, Florida	$ 5,000
Total	$910,000

III. General (Public)

1. Please discuss your views on the following criticism involving "judicial activism".

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) a tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) a tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsiblities.

I believe firmly in the separation of powers of the three branches of our government. Accordingly, issues that require social change are usually best dealt with by the legislative branch which has the responsibility of enacting the proper laws. A judge should rule on a particular issue in question and interpret the law to the specific set of facts guided by a commitment to the Constitution. It should not be the purpose of the judge to create new laws or interpret the existing statutes beyond the original meaning.

The U.S. Claims Court is a trial court where the judge acts as a finder of facts in a particular situation. It would be my responsibility to adjudicate the claim and do justice by applying, to the best of my ability, existing law to the facts.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

During my years of practice, I received numerous assignments from the Court of Common Pleas to represent indigent clients and my law firm assisted in providing pro bono legal services to the Legal Aid Society in Cleveland, Ohio. Also, I volunteered my services on special occasions organized by the Bar Association. In addition, I offered free legal advice for many years to a number of organizations in the community.

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (include any former names used).**

   Wilkes Coleman Robinson

2. **Address: List current place of residence and office address(es).**

   S R Financial Group, Inc.
   Suite 200
   7500 West 95th Street
   Overland Park, Kansas 66212

3. **Date and place of birth.**

   September 30, 1925
   Anniston, Alabama

4. **Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).**

   Julia Rowan Robinson
   Housewife
   (same address)

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   University of Alabama - AB Degree - 1948
   Tuscaloosa, Alabama
   June 1943 to September 1943
   January 1945 to June 1948

   Southwestern Louisiana Institute - Navy V-12
   (no degree awarded)
   Lafayette, Louisiana
   May 1944 - September 1944

   University of Virginia - LLB - 1951 & JD - 1972
   Charlottesville, Virginia

6. **Employment Record: List (By year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions, and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, employee since graduation from college.**

   See Schedule I.6 attached.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

   Yes, I entered the U. S. Naval Reserve in November, 1943 and after completing "boot camp" training at the U.S. Naval Air Station, Pensacola, Florida, I was assigned to the Legal Office at Bronson Field, Florida. After promotion to Seaman 1st Class (acted as Legal Yoeman), I was selected in May, 1944 for V-12 training at Southwestern Louisiana Institute in

Lafayette, Indiana. In late 1944, I developed a severe eye infection which resulted in my Honorable Discharge (for medical reasons). My serial number is 838-1418.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the committee.

Phi Beta Kappa - National Honor Society
Phi Eta Sigma - Freshman Honor Society
Phi Alpha Theta - National Historical Honor Society

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

See Schedule I.9 attached.

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).**

American Association of Retired Persons
Kappa Alpha Order Fraternity
Kansas City Rotary Club, Kansas City, Missouri
Phi Beta Kappa Honor Society

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.**

See Schedule I.11 attached.

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Enclosed are copies of Annual Report which were published by the Gulf and Great Plains Legal Foundation, which I headed from January, 1980 to May, 1985. I authored articles in this report and in similar reports regarding the cases handled by the Foundation.

While attending law school, I wrote for the Virginia Law Weekly, a publication of the University of Virginia Law School. I wrote articles on the treatment of the juvenile offender while Judge of the Juvenile and Domestic Relations Court. Some of my speeches on the Court were published in the local paper. Copies are not available.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

My health is good.
My last complete physical exam was completed by Dr. Claude Kenyon in October, 1986. A copy of Dr. Kenyon's report was furnished to the U. S. Department of Justice.

14. **Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

Judge. Recorder's Court of Anniston, Alabama from June, 1953 to June, 1955. Court had jurisdiction over all misdemeanors occuring within the city limits of Anniston and its police jurisdiction. Acted as committing magistrate for all felonies occurring within that jurisdiction. Appointment was by City Commission.

Judge Juvenile and Domestic Relations Court of Calhoun County, Alabama from April 1954 to September 1956. The Court has jurisdiction over all offenses involving the family including non-support, assault and battery, contribution to the deliquency of a minor, custody matters and matters involving juveniles whether involving dependency, neglect or delinquency. Appointment was by a Board of Directors which governed the Court.

15. **Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.**

1. No citations exist for any opinions I wrote as Judge of either court.
2. None of my decisions as judge of either court were reversed or appealed.
3. No decisions involved significant written opinions on federal or state constitutional issues.

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Government Appeal Agent for Draft Board in Calhoun Court in 1953 and 1954. Appointed.
I have never sought any elective public office.

17. **Legal Career:**

(a) **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**
2. **whether you practiced alone, and if so, the addresses and dates;**
3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

(b) 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

(c) 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:

   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:

   (a) jury:
   (b) non-jury.

17.(a) Legal Career

I have never served as Clerk to a judge or practiced law alone. The following is a chronological descriptiion of my law practice:

1951 - 1954 Attorney Associate, Bibb & Hemphill, Anniston, Alabama. (The firm is no longer in existence. Duties involved a general law practice including defense of claims against six insurance companies, civil litigation, domestic relations, divorce, criminal, wills and trusts, real estate and corporate law.

1953 - 1955 Judge, Recorder's Court, Anniston, Alabama. Jurisdiction over all misdemeanors occuring within the city. Committing magistrate for felonies occuring within the city.

1954 - 1956 Judge, Juvenile and Domestic Relations Court of Calhoun County, Alabama. Jurisdiction over all offenses involving the family including non-support, assault and battery, and dependent, neglected and delinquent children.

1956 - 1958 Attorney, Gulf Mobile & Ohio Railroad Company, Mobile, Alabama. (Company was later merged with Illinois Central Railroad, Chicago, Illinois.) Duties involved trial of commerce cases before ICC and six (6) state commissions and handling of some labor matters.

1958 - 1966 Commerce Counsel and Assistant General Attorney, Seaboard Air Line Railroad Company, Richmond, Virginia. Duties involved handling of commerce cases before ICC and nine (9) state commissions and appeal of cases to state and federal courts including the U. S. Court of Claims.

1966 - 1970 Chief Commerce Counsel, Monsanto Company, St. Louis, Missouri. Duties included regulatory matters involving ICC, USDA, FDA, U. S. Customs, and state regulatory commissions, insurance, litigation and claims, contracts, mergers and acquisitions and admiralty matters.

1970 - 1980 General Counsel and Vice President, Marion Laboratories, Inc., Kansas City, Missouri. Duties involved legal matters for corporation, including litigation, contracts, leases, licensing, regulatory matters and general corporate legal work including mergers and acquisition, securities, taxation, secretarial functions and the like.

1980 - 1985 President, Member of Board of Directors of Gulf and Great Plains Legal Foundation, Kansas City, Missouri. Duties involved directing the business and legal affairs of the Foundation, a tax-exempt law group headquartered in Kansas City, Missouri. This foundation is supported solely by contributions. It handles litigation of public interest cases on a pro bono basis in the nine (9) state region served by the Foundation on behalf of clients who otherwise would not have had counsel. Many of the cases involve constitutional law questions.

1985 - 1986 Counsel, part-time, for Howard, Needles, Tammen & Bergendoff, an architectural and engineering firm having a local office in Kansas City, Missouri. Duties involved handling of contracts, litigation, real estate, leasing and finance. Also engaged in corporate practice of law for two corporate clients, Uppercase, Inc. of Kansas City, Missouri and HSD Inc., another architectural and engineering firm in Kansas City, Missouri.

1986 - Present Vice President and General Counsel, S R Financial Group, Inc., a business brokerage firm, headquartered in Overland Park, Kansas. Also have engaged in corporate practice of law for two corporate clients listed above.

17.(b)

1. The general character of my practice has been corporate law with an emphasis upon regulatory matters before federal and state agencies.

2. My typical clients have been major corporations (two large Class I railroads, a very large chemical company and an ethical drug manufacturing company). I have specialized in regulatory matters before federal and state commissions and in corporate law including mergers and acquisitions.

C.1. I frequently appeared before state and local courts during my years of practice from 1951 to 1966. My personal appearances before courts and commissions increased during my employment with the rail carriers (listed above) but decreased during my years of corporate practice with Monsanto and Marion Laboratories. My personal appearances in court and before commissions increased from 1980 through 1985 during my tenure with the Foundation.

C.2. Most of these appearances were before Federal and State regulatory agencies and in the Federal Courts.

C.3. With the exception of my tenure as a judge of two criminal courts, all of this litigation was civil in nature.

C.4. Assuming that regulatory proceedings are classed as "courts of record", I estimate I have personally tried over one hundred (100) cases as sole or Chief counsel for the corporations represented.

C.5. 100 % were non-jury trials.

18. **Litigation:** Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

See Schedule I.18 attached.

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The following cases are the most significant legal activities I have pursued:

19 (1).

While Judge of the Juvenile and Domestic Relations Court of Calhoun County, Alabama, I had before the court a juvenile case which represented an example of the success of treatment of the juvenile offender rather than punishment. With the help of an experienced psychiatric social worker, the court rehabilitated a black juvenile prostitute who, through treatment, was thereafter able to live a more productive life

19 (2).

I represented successfully along with other commerce counsel, while serving as Commerce Counsel and Assistant General Attorney with the Seaboard Air Line Railroad Company, the Southern Rail Carriers in several major freight rate increase cases involving many millions of dollars in future revenues. These cases required an understanding of highly complex cost formulas which showed that the increases sought were necessary to the financial health of the carriers involved. I participated in hearings before the Interstate Commerce Commission and three State Commissions cost justification for the increases sought.

19 (3).

I prepared the purchase contracts and financing documents and helped to negotiate and close the purchase and financing of a $75,000,000 chemical tanker and a $3,000,000 Gulf Stream II aircraft for Monsanto Company.

19 (4).

While General Counsel of Marion Labs, I helped to negotiate, prepared and obtained execution of an important pesticide formulation agreement involving a dry form of 2, 4-D. A key provision in the Agreement required full indemnification by the formulator for any loss or damage resulting from use of the product. That provision subsequently resulted in the formulator's significant contribution to settlement of muilti-million dollar damage suits by cotton farmers in Arkansas and Louisiana.

19 (5).

While acting as General Counsel of Marion Labs I helped to negotiate, prepare and obtain execution of patent license agreements for two major new ethical drug entities which were subsequently successfully introduced by Marion into the U. S. market after F.D.A. approval. These products now account for many millions of dollars in annual sales to that company.

19 (6).

I did the legal work to acquire for Marion Labs an optical company in Phoenix, Arizona which had sales exceeding $6,000,000. The purchase involved a complex stock purchase arrangement which I helped to negotiate.

19 (7).

The following cases are representative of significant transportation cases which I handled for one or more rail carriers in southern territory, usually as principal counsel, while a trial attorney with the Seaboard Air Line Railroad Company:

1. Flowers Trucking Co., Inc. Extension application ICC Docket No. MC-117833.
2. Greenstein Trucking Company. Extension Application ICC Docket No. MC-107818 (Sub No. 22)
3. Mangum Trucking Company. Extension Application ICC Docket No. MC-116408 (Sub. No. 2).
4. Union Barge Line Corporation Extension Tampa, Florida - ICC Docket No. W-104 (Sub. No. 8).
5. Petroleum Carrier Corporation Extension Florida. ICC Docket No. MC-103378 (Sub. No. 180).
6. Application by Southern Freight Association on behalf of all carriers participating in SFTB S-341-L, ICC S-61 to amend tariffs on cement

in covered hopper cars. Florida Railroad and Public Utilities Commission. ICC Docket No. MC-6351 - RR.

7. Atlantic Coast Line Railroad Company, Freight Tariff 91-158, ICC B-3611, Seaboard Air Line Railroad Company Freight Tariff PB-9, ICC A-8301 (I&S) Docket No. 7664.

8. Application of Seaboard Air LIne Railroad Company, Extension - Qunicy, Florida. ICC Docket No. MC-86687 (Sub. No. 65).

9. Application of Seaboard Air Line Railroad Company for key point modification - Jacksonville, Florida and Talahassee, Florida - ICC Docket No. MC-86687 (Sub No. 66).

10. Seaboard Air Line Railroad Co., et. al, Complainants v. Southern Railway Co., et. al. Defendants, ICC Docket No. ______________, involving Southern Railway Co.'s rates on sand, gravel and crushed stone and other road aggregates in "articulated" cars.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

S P Financial Group, Inc., under a buy-sell agreement will purchase [illegible] percent stock ownership in the company at fair value at the time I resign from the company.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would immediately recuse myself from any case assigned to me involving a former client. Since my clients have been limited to a few large corporations, one partnership, a Foundation, and two small corporate clients, I forsee very little likelihood that recusal will ever become necessary with respect to cases assigned to me before the U. S. Claims Court.

With respect to stock or other assets which I or a member of my immediate family might own in corporations or other entities which may be involved in litigation before the Court, I would expect to examine the matter of a conflict of interest or a possible violation of established judicial ethical standards on a case by case basis following routine procedures already in place at the U. S. Claims Court. Recusal could become necessary depending upon all circumstances involved including the amount involved, the relative size of the plaintiff as compared to that amount, and the anticipated impact upon the plaintiff's business resulting from a negative decision in the matter. If required , I am willing to place all of my assets in a blind trust to avoid any such potential conflicts of interest.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Yes. In 1954, I acted as Chairman for Representative Laurie Battle's primary campaign for the U. S. Senate in Calhoun County, Alabama. My duties consisted of opening a campaign headquarters, hiring a staff, raising money for campaign expenses, purchasing ads, printing and distribution of brochures, arranging for political rallys, introducing the candidate at these meetings, filing all necessary reports and keeping records of the campaign.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   I have arranged to sell my one-half interest in S R Financial Group, Inc., a Kansas Corporation, to that entity should my appointment be confirmed. This sale would be completed within thirty (30) from the date of my confirmation, but, in any event, prior to commencement of my duties as a judge of the court. No litigation is pending in which I am presently involved. Thus, I expect no compensation to become due me after my appointment from any such litigation. Some compensation could become due me from S R Financial Group, Inc. for my share of brokerage commissions already earned, but paid subsequent to my severance from this firm.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   See Schedule II.6 attached.

III.1. General (Public)

Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal Judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plantiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

"Judicial activism" has often been defined to include the various characteristics cited in this question. My view is that judges who adhere to these characteristics in their decision making to a substantial degree are in violation of one of the most fundamental principals upon which our governmental system is based, i.e., the doctrine of separation of powers. In so doing, they threaten one of the key foundations of our governmental system.

Courts should exercise "judicial restraint" in my view. They should rule upon the facts and laws involved in the cases brought before them leaving the "problem solving" with regard to matters extraneous to the particular case to the executive and legislative branches.

There are sound economic reasons why courts should limit the scope of their rulings to the cases at issue. Courts can unduly burden the judicial system and significantly increase the costs to taxpayers by issuing problem solving decisions which require continued administration by the courts. Thus, from both a time and cost standpoint, courts should refrain from attempting to resolve problems not inherent in the issues before them.

Finally, each case is of great importance to the litigants. All parties to a law suit will normally spend a significant amount of time, effort, and money in obtaining a final decision of a court. Clearly, it is not "doing equity" for a judge to disregard the court's duty of promptly affording to the parties a full hearing and a prompt resolution of their particular disputes. Thus, it is inequitable for a court to engage in judicial activism if it materially prejudices the rights of either party in a given case to obtain a full and fair hearing on the merits and a prompt decision on the issues presented.

2. **What actions in your profession and personal life evidence your concern for equal judice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.**

During my professional career, I have twice given up a successful law practice to perform public service. In 1954, I resigned as an Associate in the firm of Bibb and Hemphill, Anniston, Alabama to accept appointment to a newly established court, The Juvenile and Domestic Relations Court of Calhoun County, Alabama, because of my belief that children should be treated instead of punished by being incarcerated in jails. In 1953-1954, I served without compensation as the Government Appeal Agent for the Draft Board.

In 1980, I resigned as General Counsel of Marion Laboratories, Inc. in order to direct a tax exempt legal foundation established for the sole purpose of representing parties on a pro bono basis who would otherwise have no counsel. Further, I have been appointed to represent indigent defendants in criminal cases and have frequently represented employees of the various corporation's I have served in the handling of legal matters on a pro bono basis because of their inability to pay a legal fee.

In my personal life, I have been a member of various service clubs, such as Rotary Club, which are dedicated to service to others and the concept of equal justice. I have given legal advise, without compensation. to those who have sought my services and been unable to pay a fee.

Schedule I.6

EMPLOYMENT RECORD
OF WILKES C. ROBINSON

1. 1986 - Present

   Vice President, S R Financial Group, Inc.
   Overland Park, Kansas - Business brokerage -
   Corporate law practice.

2. 1985 - 1986

   Attorney (part-time), Howard, Needles, Tammen & Bergendoff, Overland Park, Kansas - Architectural and Engineering firm.
   Corporate law practice.

3. 1985 - 1986

   Leasing Representative, Commercial Capital Corporation, Overland Park, Kansas - Equipment leasing -
   Corporate law practice.

4. 1980 - 1985

   President and Member of Board of Directors of Gulf and Great Plains Legal Foundation, Kansas City, Missouri - public interest law firm engaged in litigation serving a nine-state region.

5. 1970 - 1980

   Vice President and General Counsel, Marion Laboratories, Inc., Kansas City, Missouri.
   Corporate law practice.

6. 1974 -1975

   Director and Stockholder, Midwest House Movers, Inc., Overland Park, Kansas. Engaged in moving of homes.

7. 1966 - 1970

   Chief Commerce Counsel, Monsanto Company, St. Louis, Missouri.
   Corporate law practice.

8. 1958 - 1966

   Commerce Attorney and Assistant General Attorney, SAL Railroad Company, Richmond, Virginia.
   Commerce law.

9. 1956 - 1958

   Attorney, Gulf, Mobile & Ohio Railroad Company.
   Mobile, Alabama.
   Commerce law.

10. 1954 - 1956

    Judge; Juvenile & Domestic Relations Court of Calhoun County, Alabama - offenses involving the family.

11. 1953 - 1955

Judge; City Records' Court, Anniston, Alabama - misdemeanors within police jurisdiction of city.

12. 1954 - 1955

Instructor, Jacksonville State Teachers' College, Jacksonville, Alabama and U. S. Army School, Ft. McClellan, Alabama. Taught classes in political science, sociology and government.

13. 1951 - 1954

Associate, Bibb and Hemphill, Anniston, Alabama - general practice of law.

14. 1949 - Summer

Secretary, Mayor's office, Anniston, Alabama.

15. 1948 - Summer

Tour Representative, Brownell Travel Bureau, Birmingham, Alabama.

Schedule I.9

BAR ASSOCIATIONS

1. American Bar Association
2. Alabama Bar Association
3. Virginia State Bar Association
4. Virginia State Bar Association
5. Missouri Bar Association
6. Kansas Bar Association
7. Calhoun County Alabama Bar Association
8. Mobile ,Alabama Bar Association
9. Richmond, Virginia Bar Association

   Vice President, Corporate Counsel Section
10. St. Louis, Missouri Bar Association
11. Kansas City, Missouri Bar Association
12. Lawyer's Association of Kansas City, Missouri
13. Interstate Commerce Commission Practitioner's Association.

    Secretary - Richmond Chapter
    President - St. Louis Chapter

Schedule I.11

COURT ADMISSIONS

1. Alabama Supreme Court - 1951.
2. U. S. District Court, Northern District of Alabama - 1952.
3. ICC Practitioner's Association - 1958.
4. U. S. Court of Claims - 1962.
5. Supreme Court of Appeals of Virginia - 1962.
6. Missouri Supreme Court - 1966.
7. Kansas Supreme Court - 1984.
8. U. S. Supreme Court - 1963.
9. U. S. District Court, W.D. of Missouri - 1984.
10. Tenth Circuit Court of Appeals - 1984.

Schedule I.18

Because of the nature of my practice from 1966 to 1980 (primarily corporate law) I had few cases which required court appearances. Most of my trial work occurred during the period from 1954 to 1966. Unfortunately, I have few records containing detailed information regarding the cases I handled during that period. Further, it would be very difficult if not impossible, to obtain additional detailed information from any present sources regarding these cases. All of the information I presently have available is shown with respect to the following cases.

Fayette Moore v. State. 60 So. 2d 708 36 Ala. App. 551

> Case Summary. Moore was charged with first degree murder. The "striking list" contained names of jurors in accordance with statute, but there was a duplication of two names on the list. Thus, the defendant would have been required to expend four strikes or peremptory challenges to remove two persons from the jury. The trial judge, Judge de Bartelaben, refused to correct the error which he could easily have done simply by placing other jurrors names on this list. The case went to trial and Moore was convicted. On appeal, the defendant's counsel argued that this duplication violated the requirements of due process under both the U. S. and Alabama constitutions. The Alabama Court of Appeals held that the error was insufficient to constitute a denial of due process. However, the defendant obtained a reversal and a new trial on the failure of the judge to charge, when requested on the law of assault.
>
> Party Represented. Defendant, Fayette Moore.
>
> Date Represented. 1950 - 1951.

Representation. The trial of the case before the jury had already occurred when I joined defense counsel in representing the defendant. On a pro bono basis, I helped prepare the appeal and supporting briefs, participated in the oral argument to the Supreme Court of Appeals and in plea bargain negotiation of a reduced sentence for the defendant.

Judge. Judge de'Bartelaben.

Co-Counsel. Judge William C. Bibb (Retired), Coleman Drive, Anniston, Alabama (205) 237-3740.

Comment. A companion case was Johnny B. Twyman v. State of Alabama 58 So. 2d 466; 36 Ala. App. 551.

Kirsopp v. Marion Laboratories, Inc. ____________Fed Supp_____________. United States District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania.

Case Summary. Contract suit by former owners of a pharmaceutical company acquired by Marion Laboratories Inc. The complaint alleged that the owners were being prevented from making an "earn out" to which they were entitled under the acquisition agreement. After a trial before a jury, the plaintiffs were awarded over $1,000,000 in damages. The decision was set aside on motion for new trial and subsequently, before retrial, the case was settled on favorable terms to the defendant.

Party Represented. Marion Laboratories, Inc.

Date Represented. 1975 - 1976

Representation. Acted as Co-Counsel for Marion and assisted in the preparation for trial and trial of the case. Assisted in preparation and filing of motion for new trial on basis of errors made by court during jury trial. Helped in preparation of briefs and in oral argument on the motion.

Judge. Judge Newcomer

Co-Counsel. Jerome Shestak, Schnader, Harrison, Segal and Lewis, Philadelphia, Pennsylvania (215) 751-2000.

Opposing Counsel. Unknown.

Comment. During the trial of the case, Judge Newcomer admitted into evidence testimony which should have been excluded. The Court's granting of a new trial to the Plaintiff permitted a fair settlement to be reached by the parties.

American Stair Glide Corporation v. Reliance Electric Corporation. Docket No. ___________. U. S. District Court Western District, Kansas City, Missouri.

Summary. Electric motors supplied by defendant, Reliance Electric Company, to plaintiff, American Stair Glide Corporation, failed when the teeth in the gear boxes would break and allow stairway elevators to fall without activitating automatic breaking system injuring the users. The suit sought damages for breach of contract and representations and warranties.

Party Represented. Plaintiff, American Stair Glide Corporation, Grandview, Missouri, a wholly owned subsidiary of Marion Laboratories, Inc.

Date Represented. 1976 - 1978

Representation. Acted as Chief Counsel for corporation in prosecution of case. Associated outside counsel, assisted in drafting of complaint, obtaining evidence, location of expert witnesses and taking of depositions. Negotiated, with assistance of counsel, settlement of case for $150,000 after favorable deposition of our key expert witness.

Judge. Judge William Becker, U. S. District Court, W.D., Missouri, Kansas City, Missouri.

Counsel. Blackwell, Sanders, Matheny, Weary and Lombardi, Kansas City, Misssouri (Messers William Sanders and Larry McMullin) (816) 474-5700.

Opposing Counsel. Shook, Hardy and Bacon, Kansas City, Missouri (Mr. John Martin and William Zimmerman) (816) 474-6550.

Monsanto v. Kennedy, 613 F2d 947. U. S. Circuit Court of Appeals for District of Columbia, Washington, D. C.

Case Summary. Denial by FDA of approval of Monsanto's plastic packaging material for food and beverage use. Case involved question of power of FDA under the DeLaney Clause to approve an indirect additive petition if the risk of cancer is found to be diminimus. Court, on appeal found that the FDA had such power.

Party Represented. Monsanto Company

Date Represented. 1967 - 1970

Representation. Helped prepare the FDA petition and development of evidence to support the petition. Helped in negotiations with FDA and establishment of test protocals.

Agency. Food and Drug Administration.

Co-Counsel. Jerome Heckman, Keller and Heckman, Washington, D. C. (202)956-5600.

Opposing Counsel. None at the time of my involvement.

Comment. I did not personally participate in the FDA hearings or the subsequent trial of the case or appeal since my employment with Monsanto terminated prior thereto.

A. L. Mechling Barge Lines, Inc., Extension - Ohio River, ICC Docket No. W-630 (Sub-No. 10).

Case Summary. Mechling Barge Lines of Joliet, Illinois sought authority for barge operations between Florida ports of Tampa, South Boca Grande, Fort Meyers, Miami and Port Everglades on one hand, and, on the other, certain river ports. The request was opposed by other common carriers including certain Class I rail carriers in Southern Territory and in Western Territory and the Pennsylvania Railroad Company. After hearings and argument, the Commission denied the application finding that the public convenience and necessity did not require a grant of the authority sought.

Party Represented. Class I Rail Carriers in Southern Territory.

Date Represented. 1959 - 1963.

Representation. Acted as Co-Counsel for carriers in hearings before the Commission, prepared and filed petitions, reply to exceptions, reply to petitions for reconsideration, and briefs and assisted in oral argument before Commission.

Co-Counsel. Other rail counsel included attorneys John W. Adams, Jr. (GM&O) and Donal L. Turkal (SAL) (both retired).

Opposing Counsel. William Knudson, Washington, D. C. (deseased).

Comment. Mechling appealed the decision to the United States District Court for the Northern District of Illinois, Civil Action No. 62-C-170. The appeal was denied.

Seaboard Air Line Railroad Company v. Virginia Corporation Commission. Virginia Supreme Court of Appeals, Richmond, Virginia, Record No. 5594.

Case Summary. The railroad petitioned the Virginia Corporation Commission to allow its trucking subsidiary to operate over a shorter highway route between Petersburg and Hopewell, Virginia in rendering auxilliary and supplemental truck service. The Commission dismissed the application on the grounds that as a matter of law, the applicant was not entitled to serve on the highway route because it did not exactly parallel its rail line. On appeal by the railroad, the Virginia Supreme Court of Appeals reversed on a finding of an abuse of discretion and ordered the Commission to grant a hearing to the applicant.

Party Represented. Seaboard Air Line Railroad Company.

Date Represented. 1964 - 1965.

Representation. Acted as sole counsel for railroad in proceedings before the Commission. Prepared petition, presented evidence at hearing. After denial of petition, filed appeal, wrote brief in support of appeal and made oral argument to Court. Co-Counsel attended the oral argument but did not participate.

Commission and Court. Virginia Corporation Commission and Virginia Supreme Court of Appeals, Richmond, Virginia.

Co-Counsel. Eppa Hunton (deceased) of Hunton and Williams, Richmond, Virginia.

Opposing Counsel. Unknown staff counsel for the Virginia Corporation Commission and for appellee, Richmond-Petersburg Freight Lines.

Comment. This case was unique in that it represented a very rare reversal by the Court of an order of the Virginia Corporation Commission because of an abuse of discretion.

Seaboard Air Line Railroad Company v. United States. United States Court of Claims, Docket Nos 119-62 and 281-62 (ICC Docket No. 34489)

Case Summary. The Seaboard Air Line Railroad Company assessed and collected charges for government rail shipments based upon application of a Class 85 rating published in the Uniform Classification for "freight automobiles". The General Accounting office contended that the charges should have been assessed and collected based upon a Class 45 rating on "machinery" and made deductions accordingly. Suit was filed to recover the deductions. The case was consolidated with another similar case and referred to the Interstate Commerce Commission for determination of the proper rating to be applied. The items shipped were truck chassis with tanks and spraying equipment mounted thereon. The Examiner concluded that the articles were properly shipped as "freight automobiles". The Commission reversed the Examiner's findings and found that the articles were properly classed as "Machinery". Due to a procedural error, the case was not appealed. The Court of Claims later entered an order in conformity with the findings of the Commission.

Party Represented. Seaboard Air Line Railroad Company; Atlantic Coast Line Railroad Company.

Date Represented. 1964 - 1966.

Representation. Filed suit in Court of Claims. Served as principal counsel for rail carriers in consolidated case before ICC, prepared and presented evidence at hearing, filed briefs, petition for reconsideration and other pleadings.

Commissioner. Lawrence Walbrath (retired).

Opposing Counsel. Unknown. Department of Justice attorney.

Comment. The appeal of Commissioner Walrath's unfavorable order was not pursued due to a procedural error made by counsel that succeeded me in the case in 1966.

Seaboard Air Line Railroad Company v. North Carolina Natural Gas Company, et. al. North Carolina Utilities Commission, Raleigh, North Carolina. Docket No. G-21 (Sub. No. 15).

Case Summary. Under North Carolina law, a public utility desiring to tunnel under a railroad's right of way in the state was required to pay damages for the taking involved. The dispute in this case was over the amount of monetary damages to be awarded. The Gas Company had offered a minimum amount as a lump sum payment. After a full hearing before the Commission, the Commission awarded a much higher amount based upon a showing of continuing damage due to settlement of trackage over the pipeline.

Party Represented. Seaboard Air Line Railroad Company.

Date Represented. 1962 - 1963.

Representation. Acted as Principal Counsel for railroad and handled preparation for hearing, oral argument and submission of briefs to the Commission.

Court. North Carolina Utilities Commission.

Opposing Counsel. Unknown.

Comment. The damage award was favorable and the case represented an important precedent for similar claims by railroads in both North Carolina (Seaboard Air Line Railroad Company v. Public Service Company of North Carolina, Inc. - Docket No. G-5 (Sub. No. 33) and other states.

Marion Laboratories, Inc. v. Michigan Pharmacal, Inc.
473 F2d 910, Sixth Circuit Court of Appeals, 1973, Cincinnati, Ohio.

Case Summary. Marion Laboratories sued a generic drug manufacturer in federal court in Detroit, Michigan seeking an injunction against the defendents manufacture and sale of capsules in color combinations exactly duplicating those of Marion's product, PAVABID. The U. S. District Court, Eastern District in Detroit, Michigan denied the injunctive relief sought and found that the evidence was insufficient to support a finding that the defendant drug manufacturer was knowingly inducing pharmacists to engage in substitution of "look alike" capsules (338 F.Supp 762) The Circuit Court of Appeals affirmed the decision of the trial court on the basis of the record.

Party Represented. Marion Laboratories, Inc.

Date Represented. 1970 - 1972

Representation. Acted as Co-Counsel and assisted in preparation for trial and trial of case before Jury and in the appeal to the Sixth Circuit.

Judge. Judge Ralph M. Freeman, U. S. District Court, Detroit, Michigan.

Co-Counsel - Raymond McMurray (deceased) and William Pendergast (now with the firm of Arent, Fox, Kintner, Plotkin & Kahn, Washington D. C. (202) 857-6029, and Dan Cullen and Bernard Cantor of Cullen, Settle, Sloman and Cantor of Detroit, Michigan (appeal to Sixth Circuit).

Opposing Counsel. William Garratt, Detroit, Michigan.

Comment. There was no U. S. precedent at the time involving the question of inducement of violation of a common law right to a particular trade dress for a consumer product. There were two other similar cases filed by Marion Laboratories, Inc. against generic drug manufacturers which did not go to trial in view of the decision in Michigan Pharmacal.

Missouri Coal Cases. Docket No. ________, Missouri Land Reclamation Commission, Jefferson City, Missouri.

Case Summary. Six small surface coal operators in Missouri were threatened with bankruptcy when the Missouri Land Reclamation Commission served notice that it would adopt new regulations requiring reclamation practices which were economically unjustified and unsound from an operating standpoint. The coal operators formed an association and opposed the adoption of the new regulations in hearings before the Commission. Upon the evidence presented the Commission found that the new regulations were not required and that present reclamation practices met the Commission's regulations.

Party Represented. Mid-Missouri Coal Operators Association.

Date Represented. 1983 - 1984.

Representation. Prepared evidence for presentation at the hearings and made oral arguments to Commission against adoption of the regulations.

Judge. Missouri Land Reclamation Commission.

Opposing Counsel. Assistant Attorney General, Jefferson City, Missouri.

Rocky Mountain College et. al. v. South Dakota Utilities Commission. Docket No. ____________.

Case Summary. The South Dakota Utilities Commission denied Montana Dakota Utilities' petition to adjust its rates based upon the inclusion in the supporting cost data of a novel method of financing stored natural gas which would have incurred higher initial costs but over a period of years would have saved rate payers over $50,000,000 when compared with the costs of conventional financing. Montana Dakota Utilities filed suit in the Federal Court in Pierre, South Dakota seeking an order reversing the Commission's findings and granting the rate relief sought. Rate payers represented by Gulf and Great Plains Legal Foundations also filed suit and the cases were consolidated for trial. After the filing of these suits, the Commission reopened the case on its own motion, and, after a rehearing, agreed to accept the contested data and grant the rate increases requested, This resulted in dismissal of the suits pending in the Federal Court.

Party Represented. Group of approximately twenty small corporations, municipalities, counties, hospitals and individuals.

Date Represented. 1983 - 1985

Judge. South Dakota Utilities Commission, Pierre, South Dakota.

Representation. Directed the filing of the suit and supervised the litigation; negotiated the settlement with opposing counsel.

Opposing Counsel. Walter Washington, Assistant Attorney General, Public Utilities Commission, Pierre, South Dakota.

Widmar v. Vincent. 454 U.S. 269 (1981)

Case Summary. Bible study groups on campuses of the University of Missouri school system, upon application were denied the use of campus meeting rooms for purposes of religious services while other campus groups were being allowed use of these same facilities for their activities. Members of these Bible study groups filed suit in the United States District Court for the Western District of Missouri seeking an injunction against the defendants, enjoining them from continuation of this denial and granting them equal access to these facilities for purposes of religious worship.

The district Court, Judge William A. Collinson, held that the Establishment Clause of the U. S. Constitution acted as a bar to the grant of equal access fo the facilities.

The Eighth Circuit Court of Appeals reversed and held for the plaintiffs.

Upon appeal, the United States Supreme Court held that the Establishment Clause would not be violated by an equal access policy if it met a three-pronged test:

(1) Would an equal access policy have a secular legislative purpose?

(2) Would the principal or primary effect of an equal access policy be one that neither advances nor inhibits religion?

(3) Would an equal access policy foster an excessive School District entanglement with religion?

The Court found that the plaintiffs use of these campus facilities met these tests and thus, affirmed the Court of Appeals decision in favor of the plaintiffs.

Party Represented. Bible study groups (Christian Legal Society, et. al.)

Date Represented. 1980 - 1981.

Representation. Acted as advisory counsel to counsel representing the individual plaintiffs and acted as co-counsel to the bible study groups along with other counsel employed by Gulf and Great Plains' Legal Foundation.

Judge. Federal District Judge William R. Collinson, Kansas City, Missouri.

Co-Counsel. James M. Smart Crews, Smart, South, Whitehead, Reaves and Waits, Kansas City, Missouri (816) 363-5466.

Opposing Counsel. Jackson Wright, General Counsel, University of Missouri, Columbia, Missouri.

Comment. The Widmar case was an important precedent cited by the Court in the Country Hills Christian Church case.

Country Hills Christian Church v. Unified School District No. 512, Johnson County, State of Kansas, 560 F. Supp 1207.

Case Summary. Church and others brought suit for declaratory judgment and a permanent injunction ordering school district to make facilities of school district open to plaintiffs for purposes of religious worship on same basis as to nonreligious groups. The Court held that: (1) by allowing school facilities to be used during nonschool hours by nonschool community groups, defendants created a "public forum" for exercise of first amendment rights and opened it for community use (2) by denying plaintiff's access to public forum solely because of content of plaintiff's proposed speech, defendants violated First Amendment, and (3) establishment clause provided no defense to that action. The defendants filed an appeal to the Tenth Circuit Court of Appeals, but subsequently dismissed that appeal upon agreement of the school board to comply with the District Courts finding.

Party Represented. Country Hills Christian Church and other individual plaintiffs.

Date Represented. 1982 - 1983.

Representation. Acted as Co-Counsel for plaintiffs in directing prosecution of case, assisting in drafting of pleadings and briefs and supervision of other counsel.

Judge. Federal Judge Dale Saffels, Kansas City, Kansas

Co-Counsel. Marvin E. Rainey, attorney, Overland Park, Kansas (913) 341-5280.

Opposing Counsel. Robert Bennett, John L. Vratil, Bennett, Lytle, Wetzler, Winn and Martin, Prairie Village, Kansas (913) 642-7300.

Comment. The case established an important precedent which has been followed in Kansas and other states by many school boards similiarly situated.

Hollis v. United States. Docket No. ______. United States District Court for Western District of Oklahoma.

Case Summary Three royalty owwners sued to have the Windfall Profit Tax on crude oil declared unconstitutional on the grounds that the tax was unevenly applied among the states. The District Court dismissed the complaint on procedural grounds. On appeal to the Tenth Circuit Court of Appeals in Denver, Colorado, Docket No. 82-1780, that Court reversed this dismissal and remanded the case to the District Court for trial. However, the constitutional issue had already been unfavorably decided in Ptasynski v. United States. Thus the complaint was withdrawn.

Party Represented. Plaintiffs, Mr. and Mrs. Hollis and Mrs. Jeane Quinette.

Date Represented. 1983 - 1984

Representation. Directed handling of case for Foundation. Review of briefs and pleadings.

Judge. Federal District Judge Luther Eubanks

Co-Counsel. James E. Work, Oklahoma City, Oklahoma (403) 236-3571.

Opposing Counsel. Jack D. Warren, Tax Division Department of Justice Attorney, Washington, D. C.

Allison v. Block, United States District Court for Western District of Missouri, Kansas City, Missouri, Docket No. 83-1194-WM.

Case Summary. Plaintiff sued the Secretary of Agriculture to enjoin FMHA's foreclosure proceedings against the plaintiff, which would have caused loss of family farm, on the ground that FMHA had not complied with notice provisions under the statute. The Court granted the injunction. The same issue was litigated in other Courts successfully.

Party Represented. Allison family.

Date Represented. 1983 - 1985.

Representation. Directed the investigation of case, filing of suit and supervised litigation.

Judge. U. S. District Judge, Scott O. Wright, 811 Grand, Kansas City, Missouri.

Co-Counsel. Dale Reesman, 527 East High Street, Booneville, Missouri, (816) 882-6525.

Opposing Counsel. Robert G. Ulrich, U. S. Attorney, 811 Grand, Kansas City, Missouri, (816) 374-3122.

Comment. The Foundation's efforts resulted in a major victory for farmers in Missouri, many of whom were faced with foreclosure proceedings. The FMHA subsequently amended its procedures to comply with the ruling.

SCHEDULE II.o

Confidential Financial Statement Net Worth [illegible]

Wilkes C. and Julia R. Robinson *

Assets	Individual	Joint	Liabilities	Individual	Joint
Cash on hand in banks					
JRR	$1,750	$2,000			
WCR	$200		Notes Payable		$0
CD's and Savings			Accounts Payable		$1,000
JRR	$90,000				
WCR	$25,000		Unpaid R.E. Taxes		$1,000
Listed Securities (Schedule A)			Unpaid Income Taxes		$40,000
JRR	$36,865				
WCR	$630,250				
			Mortgages Payable on Real Estate		$47,000
Unlisted Securities **					
WCR	$40,000		Other Debts		$0
Accounts & Notes Receivable					
JRR (Relative)	$10,000				
WCR (Relative)	$15,000				
WCR (Doubtful)	$5,500				
Real Estate Owned (Schedule B)					
JRR	$40,000	$253,500			
Autos and Other Personal Property		$40,000			
Other Assets					
WCR -Ins. Annuity	$100,000				
Total Assets	$994,565	$295,500	Total Liabilities	$0	$89,000
TOTAL ALL ASSETS		$1,290,065	TOTAL ALL LIABILITIES		$89,000
			NET WORTH		$1,201,065

* My son, Thomas Wilkes C. Robinson, a student at Baylor University (Waco, TX), has cash accounts totalling $10,000.

** 100 Shares of Common Stock in S R Financial Group, Inc.

03-Feb-86

SCHEDULE A

Confidential Financial Statement
Net Worth
Wilkes C. and Julia R. Robinson

LIST OF SECURITIES, STOCKS AND BONDS

Quantity	Unit of Quantity	Description of Security	Mkt Value Owned by Julia Robinson	Mkt Value Owned by Wilkes Robinson
8,250	Shares	Marion Labs - Common		$400,000
7,000	Shares	Butler National - Common		$7,000
4,000	Shares	Phoenix Leasing		$4,000
110	Units	Portland Oregon PHA Bonds		$96,250
80	Units	Insured Municipal Inc. T.		$75,000
992	Units	Fidelity Hi Income Fund-38		$10,000
2,053	Units	Vanguard Corp. Bond Fund-2		$19,200
1,863	Units	Vanguard GNMA Fund-36		$18,800
200	Shares	Exxon	$16,800	
200	Shares	Best Products Common	$2,000	
15	Shares	Damson	$15	
349	Units	Putnam High Inc. Fund	$4,200	
4,000	Units	Phoenix Leasing	$4,000	
10	Units	Balcor	$10,000	
		TOTALS	$37,015	$630,250
		GRAND TOTAL		$667,265

SCHEDULE B 03-Feb-86

Confidential Financial Statement
Net Worth
Wilkes C. and Julia R. Robinson

Land and Buildings

Date Purchased	Cost	Market Value	Title in Name Of	Description	Mortgagor	Mortgage Balance
Aug-82	$53,500	$53,500	Joint	Lot in Indian Bayou Estates Destin, FL	Indian Bayou Properties	$0
Aug-[illegible]	$40,000	$40,000	JRR	Lot in Indian Bayou Estates Destin, FL	Indian Bayou Properties	$0
Mar-86	$10,000	$10,000	Joint	Limited Partnership interest in Broadway Associates Kansas City, MO	None	None
Mar-75	$100,000	$150,000	Joint	Personal Residence Joint Tenancy 10139 Craig Drive Overland Park, KS 66212		$47,000
	$203,500	$253,500		TOTALS		$47,000

CONFIRMATION HEARING ON: MICHAEL S. KANNE, JAMES H. ALESIA, JOSEPH P. STADTMUELLER, AND ROGER B. ANDEWELT

TUESDAY, APRIL 28, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:40 p.m., in room SD-226, Dirksen Senate Office Building, the Hon. Paul Simon (acting chairman) presiding.

Also present: Senator Thurmond.

Staff present: Steven J. Metalitz, special counsel; Deborah Leavy, counsel to Senator Simon; Robert Short, minority chief investigator; Stephanie Hamlett, nominations clerk.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. The committee will come to order.

My apologies to my colleagues and to the nominees.

In the interest of time, I will place my opening statement in the record.

[Prepared statement follows:]

OPENING STATEMENT OF SENATOR PAUL SIMON

This afternoon, the Judiciary Committee holds its fourth hearing in this Congress to consider nominations to the federal courts.

Three of the four nominees on this afternoon's agenda have been nominated for positions located within the Seventh Circuit, which includes the states of Illinois, Wisconsin and Indiana. The first nominee, Judge Michael S. Kanne, is currently a federal District Court judge in Northern Indiana. He has been nominated to move up to the Seventh Circuit Court of Appeals. The next two nominees are James H. Alesia, to be U.S. District Judge for the Northern District of Illinois, and Joseph P. Stadtmueller, to be U.S. District Judge for the Eastern District of Wisconsin. Finally, we will hear from a nominee to the U.S. Claims Court, Roger B. Andewelt of the District of Columbia.

As we customarily do, we will hear first from Senators who wish to introduce nominees to the Committee. Before we turn to the Senators, let me note for the record that each nominee before the Committee today has completed an extensive questionnaire on his qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing. We will also keep the record open for a limited time for follow-up questions to the nominees, and for additional questions that may be submitted by members of the Committee who are unable to be present this afternoon. We will also include in the record the full introductory statements of home-state Senators.

First, let me just take them in the order of appearance here. Michael S. Kanne, to be U.S. Circuit Judge for the Seventh Circuit, if you could come forward. We will not swear you in yet, but if you can come forward, together with Senator Lugar here, and, Senator Lugar, you can introduce him and then we will get to your testimony a little later, Mr. Kanne.

STATEMENT OF HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator **Lugar**. Thank you very much, Mr. Chairman.

Mr. Chairman, I would like to mention that along with Michael Kanne is Judith Ann, his wife, and his children, Ann and Kate, today. They are with us here in the hearing room and are looking forward, as we all are in Indiana, to this hearing.

It is an honor and a privilege to introduce to this distinguished Committee Judge Michael Kanne, nominated to the United States Court of Appeals for the Seventh Circuit. Judge Kanne's credentials are impressive. He earned his bachelor's degree from Indiana University in 1962, went on to serve his country in the Air Force for three years.

He later graduated from Indiana University School of Law, with a juris doctorate degree. Judge Kanne has since completed a general jurisdictional program at the National Judicial College in additional administration programs at the University of Birmingham, in England.

Judge Kanne's legal and judicial background is extensive. He was in private practice from 1968 to 1972, when he was appointed a judge in the 30th Judicial Circuit of Indiana. He remained an Indiana Circuit Court judge until 1982, when he was appointed to the United States District Court in Hammond, where he presides today.

Judge Kanne also teaches constitutional law on a part-time basis at St. Joseph's College, in Rensselaer, Indiana. He has established an excellent record on the bench. During his 15 years as a judge, he has handled over 11,000 cases, ranging from small civil cases to criminal proceedings and more complex constitutional questions.

Of the 11,000 cases tried by Judge Kanne, 170 were appealed, and only 17 of those appealed were reversed either in whole or in part.

Mr. Chairman, Judge Kanne's professional accomplishments clearly speak for themselves. It is also important to note that he is highly regarded by persons with whom he has been associated, both inside and outside the professional realm.

The prestigious Chicago Council of Lawyers has thoroughly reviewed Judge Kanne's credentials, has deemed him qualified for a position on the United States Circuit Court of Appeals.

It is a privilege to introduce Judge Kanne to this Committee and to urge your support for his confirmation.

Thank you.

Senator **Simon**. I thank you very much, Senator Lugar.

Judge Kanne, forgive me for mispronouncing your last name. I may not have been the first person to do that in your lifetime.

We are pleased to be joined by the distinguished junior Senator from Indiana, Senator Quayle.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you very much, Mr. Chairman. It is an honor to join with my senior colleague, Senator Lugar, in recommending Judge Kanne to you. He is here. His wife and two daughters are also here at this hearing.

I think Senator Lugar has covered his background and his capabilities in the judicial arena quite adequately. I would only add a couple of footnotes.

One, Mr. Chairman, you might be interested that Judge Kanne is a product of Senator Lugar's and mine, our Merit Selection Committee for District Court judges. Judge Kanne went through that process a number of years ago and was selected through that Merit Committee and now has been recommended for the Seventh Circuit Court of Appeals, so I think that speaks well for the kind of process that we have established at least in Indiana for the selection of our judges as we make recommendations to the Justice Department, and now they have seen fit and the President is making this recommendation of a very distinguished U.S. District judge in Judge Kanne.

I know that the Chairman also covers the seventh circuit, coming from the State of Illinois. He has intense interest on what kind of judges we put on the Seventh Circuit Court of Appeals, and I think that you will find, Mr. Chairman, and I hope and I know that you and your still will do a very diligent research, but you will find Judge Michael Kanne to have really an outstanding background in jurisprudence, his teaching of constitutional law and his record on the bench. His record on the bench as a State Circuit Court judge, as a District Court judge I think will speak for itself, so I do not believe that there is anything I can add except that he is a man with a great deal of ability, a great deal of integrity and a family man, and somebody that I am darn proud of to be here today, and I hope that the Committee enthusiastically and without dissent will recommend to the full Senate his confirmation.

Senator SIMON. Thank you.

Senator QUAYLE. I ask that my entire statement be made a part of the record.

Senator SIMON. Your full statement will be entered in the record and I might add, Judge Kanne, that it is a tribute to you that both of your Senators are here.

[The prepared statement of Senator Quayle follows:]

PREPARED STATEMENT OF U.S. SENATOR DAN QUAYLE

Mr. Chairman, I welcome the opportunity to address you and the members of this Committee regarding the President's nomination of U.S. District Court Judge Michael S. Kanne to be a U.S. Circuit Court Judge on the U.S. Court of Appeals for the Seventh Circuit.

I take great pleasure in introducing Judge Kanne, a person of considerable skill, competence and integrity. I commend President Reagan for his January 29 nomination of this distinguished jurist to the second highest court in our land.

A native of Rensselaer, Indiana, Judge Kanne began his undergraduate education at St. Joseph's College. He later transferred to Indiana University, where he received his Bachelor of Science degree in 1962 and his J.D. degree in 1968. Judge Kanne served in the U.S. Air Force From 1962-1965. He was admitted to the Indiana Bar in 1968, and he was in private practice in Rensselaer from 1968-1972.

Michael Kanne has to his credit 14 years of experience as a sitting judge. His first appointment came in 1972 when Indiana Governor Edgar Whitcomb chose him to serve as Jasper County Circuit Court Judge, a position he held for 10 years.

In 1981, President Reagan accepted the recommendation of the Merit Commission on Federal Judicial Appointments that Senator Lugar and I established that year and nominated Judge Kanne to the federal bench. As some of you will remember, Judge Kanne's nomination to be a U.S. District Court Judge for the Northern District of Indiana was reported favorably by this Committee. The full Senate later confirmed Judge Kanne by unanimous consent on February 24, 1982. Judge Kanne has sat in Hammond, Indiana, since his elevation to the Federal bench.

I believe Michael Kanne's exemplary service as a U.S. District Court Judge for the Northern District of Indiana is ideal preparation for the Seventh Circuit Court of Appeals. The Northern District of Indiana's Hammond venue is the second busiest in the country. As a result, Judge Kanne has handled a wide variety of federal cases. He has been able to manage the incredibly heavy case load with equanimity and even-handedness—the very qualities and temperament we need in the federal judiciary.

Soon after a vacancy was created on the Seventh Circuit Court of Appeals when Judge Jesse E. Eschbach of Fort Wayne took senior status in November 1985, I wrote the U.S. Justice Department to recommend Judge Kanne for the position. I am pleased to see him before this Committee today as the President's nominee for this higher court, which sits in Chicago and is charged with reviewing appeals of decisions handed down by the U.S. District Courts in Indiana, Illinois and Wisconsin. Judge Kanne's training, experience and temperament are such that I have no doubt he will comport himself dutifully, diligently and dispassionately to ensure the rule of law is fairly and fully upheld as a U.S. Circuit Court Judge.

Judge Kanne commands the respect and admiration of his colleagues in the legal and judicial profession. In 1987, he received a Presidential Citation from the Indiana State Bar Association, and he became a Fellow of the Indiana Bar Association in 1986. He has also held elected offices in the Indiana Judges Association, the Indiana State Bar Association and the Indiana Judicial Conference.

Despite his busy schedule on the bench, Judge Kanne has found time to lend his support to several organizations in his community. He has worked with the Boy Scouts of America, the St. Joseph's College Alumni Association and the American Lung Association of Northwest Indiana. Judge Kanne also teaches a class in Constitutional Law at St. Joseph's College on a part-time basis.

Because of his years of experience and civic participation, Judge Kanne has earned the respect of his fellow citizens as well. I would like to share with the members of the Committee brief excerpts from editorials that appeared in two of the leading newspapers in Northwest Indiana regarding his recent nomination. On August 1, 1986, The Times of Hammond wrote that "* * * there should be no debate over Kanne's qualifications. He has proved to be a competent judge and is highly respected by the legal profession." On February 6, 1987, The Post Tribune of Gary editorialized that "[Judge Kanne] has become highly respected for his knowledge of the law, his competence, his honesty and his fairness."

Mr. Chairman, I believe the evidence is very clear that Judge Kanne is fully qualified to serve on the Seventh Circuit Court of Appeals. He has the necessary experience and respect from his peers that any good candidate for this high office should possess.

Again, I thank the Chairman and members of this Committee for allowing me this time to speak on Judge Kanne's behalf. I urge the members of the Committee to act promptly and favorably on Judge Kanne's nomination.

Senator **SIMON**. Senator Thurmond, do you wish to add anything at this point?

Senator **THURMOND**. No, Mr. Chairman.

Senator **SIMON**. We will get into the question a little later on. We are just going through the formal introductions at this point.

Senator **THURMOND**. I have no special statement at this time, just to congratulate him for his appointment by the President. He is now a District Court Judge being promoted to the Circuit Court and that is a promotion in your career of which I know you are proud. I want to congratulate you on having two very fine and able and influential Senators from Indiana who endorse you.

Judge **KANNE**. Thank you, Senator.

Senator **Thurmond**. And that will be of great benefit to you.

Judge **Kanne**. Thank you.

Senator **Simon**. We thank you very, very much, and we thank our two colleagues for joining us here.

From the State of Illinois, James H. Alesia, and my colleague, Senator Dixon, will introduce you and, if I may add a few words then, because I join in being very proud of this nomination.

The very senior Senator from Illinois.

STATEMENT OF HON. ALAN J. DIXON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator **Dixon**. Thank you, Mr. Chairman.

Mr. Chairman and members of the Committee, it is my pleasure to introduce Mr. James H. Alesia, an outstanding selection for U.S. District Judge for the Northern District of Illinois.

I sincerely believe that Jim Alesia demonstrates every quality society demands from its appointed members of the judiciary—intelligence, strong moral character, a great sensitivity for what is fair, and a demonstrated record of hard work and accomplishment in his profession.

May I say to the members of this Committee that there is little doubt in my mind that James Alesia has fulfilled all of these criteria. He enjoys and has earned the respect of his colleagues in the legal community; he comes from a family I know and regard highly.

Finally, he has demonstrated by his own actions his commitment to the body of laws which govern our society. James Alesia worked as a Chicago police officer to get through law school. He later served the Northern District as Assistant United States Attorney. From 1973 to 1980, Mr. Alesia served as an administrative law Judge for the United States Social Security Administration, and today he is engaged as an attorney in all aspects of litigation at the firm of Isham, Lincoln and Beale.

Mr. Alesia is joined today by his wife—I wonder if she would stand—the former Kathryn Gibbons, with their two sons, Brian and Daniel, if they would stand, please, to make themselves known to the Committee.

The family resides in Park Ridge, Illinois, and may I say to the Chairman, the only other thing I know in favor of this candidate is that he is a devout fanatical Cubs fan, Mr. Chairman. [Laughter.]

Senator **Simon**. If the Chair could just add that Mr. Alesia also once was associated in a law practice with a man who is now a distinguished Judge in Illinois, who is a very good friend of Senator Dixon's and mine, Judge Anthony Scariano who also speaks very highly of Mr. Alesia.

We are very pleased to have you here and I thank my colleague for joining us here today.

Mr. **Alesia**. Thank you, Mr. Chairman.

Senator **Dixon**. I thank the Chairman.

Senator **Simon**. Senator Thurmond.

Senator **Thurmond**. Well, I Just want to congratulate you upon your appointment. I believe you have had an interesting career. You were an administrative law judge.

Mr. **Alesia**. That is correct, Senator.

Senator **Thurmond**. But now you are practicing law?

Mr. **Alesia**. That is correct, Senator.

Senator **Thurmond**. Private practice?

Mr. **Alesia**. That is correct.

Senator **Thurmond**. You have two very fine Senators who are here endorsing you, both of them; even though they are Democrats, they are very fine people. [Laughter.]

I wish you well.

Mr. **Alesia**. Thank you very much, Senator.

Senator **Simon**. We thank you.

Senator **Dixon**. Senator, the candidate is a member of a law firm that once had a very distinguished Illinois Republican in it, Abraham Lincoln.

Senator **Simon**. We thank the Senator.

The next nominee is Mr. Joseph P. Stadtmueller, from the State of Wisconsin. We are pleased to have both of the Senators from Wisconsin here.

Senator Kasten, the junior Senator from Wisconsin.

STATEMENT OF HON. ROBERT W. KASTEN, JR., A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator **Kasten**. Thank you very much.

Mr. Chairman, ranking member, and members of the Committee, thank you for inviting us here today. I am delighted to introduce to you a distinguished public servant and a member of the Wisconsin local community, Joe Stadtmueller, who has been nominated by the President to be U.S. District Judge for the Eastern District of Wisconsin.

I would also like to point out that Joe is joined today by his wife and his daughter and his son, who are seated right behind Senator Proxmire.

Joe Stadtmueller graduated from Marquette University Law School in 1967 and became a Federal prosecutor in 1969. After twelve years as an Assistant Attorney General in Wisconsin's Eastern District, he was appointed United States Attorney there in 1981. As a U.S. Attorney, Joe Stadtmueller has emphasized competence, thoroughness and hard work. Leading figures in the Wisconsin legal community have commended Joe for his intelligence, for his integrity and for his compassion.

Also, I would like to point out that he received a rating of well qualified from the Standing Committee of the Federal Judiciary of the American Bar Association. As a result of his outstanding public record and the many recommendations he received, the Merit Selection Committee appointed jointly by Senator Proxmire and myself—and I am pleased that the two of us are joined together here at the table today—the State Bar of Wisconsin also participated in this process and our selection committee recommended Joe Stadtmueller to us to fill the vacancy left when Judge John Reynolds took senior status last September.

So it gives me great pleasure, Mr. Chairman and members of the Committee, to join my distinguished senior colleague, Senator Bill

Proxmire, in presenting to your Committee a man who I am sure will be an outstanding Federal judge, Mr. Joe Stadtmueller.

Thank you.

Senator Simon. Thank you very much, Senator Kasten.

The distinguished senior Senator from Wisconsin, Senator Proxmire.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator Proxmire. Thank you, Mr. Chairman.

Mr. Chairman and Senator Thurmond, I appreciate the opportunity to say a few words in support of the nomination of Joe Stadtmueller for appointment to the U.S. District Court for the Eastern District of Wisconsin.

My colleague from Wisconsin, Senator Kasten, has ably summarized the sparkling qualifications of Joe Stadtmueller for this important post. I will not repeat that background information, but I do want to say how impressive I believe it is.

Let me direct a few words to my fellow Democrat on the Judiciary Committee, the Chairman, Senator Simon. The nominee I am endorsing this afternoon, Joe Stadtmueller, is a staunch Republican. He probably has never voted for any Democrat, including me, in his life, but I am here to tell you that I support him anyway because I believe that he is a very good man and very well qualified to be a U.S. District Court Judge for the Eastern District of Wisconsin.

I want to share with the members of the Judiciary Committee, and all others in the room today as well, the words uttered by Terrence T. Evans, a man who was a life-long Democrat and who was one of Joe Stadtmueller's colleagues to be in the U.S. District Court. Evans is a genuine, diamond solitaire star, believe me. He is the Paul Simon of the Wisconsin Democratic bench.

Here is what Judge Evans had to say about learning of Joe Stadtmueller's nomination to be on the Federal bench: "If U.S. Attorneys were basketball players, Joe Stadtmueller would be Michael Jordan. He is smart, decisive, compassionate, and he has a wonderful temperament."

Now, that is high praise indeed in these glory days of one victory after another by the Milwaukee Brewers, and we might want to substitute the name of a Brewer star for Michael Jordan, but come to think of it, selecting just one outstanding Brewer from that mighty band would be politically foolish for me, as a Wisconsin Senator, so I think I will be content to go along with Judge Evans and settle for the great Michael Jordan.

Mr. Chairman, I am proud of Joe Stadtmueller and his superb record of public service. I am confident that he will bring distinction and dedication to his work as a Federal Judge. I recommend Joe Stadtmueller to all members of the Judiciary Committee, without reservation and with much enthusiasm. I am delighted to join with Senator Kasten in presenting him to you at this time.

I want to say that I have just met his family and it is a delightful family, I was most impressed by his wife, his son and his daughter. I just hope they grow up to be Democrats. [Laughter.]

Senator SIMON. We are pleased to have Michael Jordan here as a nominee here today, too. [Laughter.]

We thank you both and, again, Mr. Stadtmueller, having both of these Senators who are highly regarded in this body here for you is a tribute to you.

Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman.

Well, I want to congratulate you, too, upon your appointment by the President to be a Federal District Court Judge. That is probably one of the most desirable positions in the United States, if you are interested in law and being a judge. You have got all the power, you have got the romance of the courtroom, and if you love to try cases as a lawyer, I think you will enjoy being a trial judge.

I was a Circuit Judge in South Carolina and a trial judge and there was nothing that I enjoyed more than that. I want to congratulate you, too, upon having both your Senators to endorse you. They are both held in high esteem here and they can be of tremendous benefit to you here, and I know you are proud to have the endorsement of both of these fine men.

Mr. STADTMUELLER. Thank you, Senator.

Senator SIMON. We thank you all very, very much.

Mr. Stadtmueller, if you could just stay there, and I would ask Judge Kanne, Mr. Alesia, and Mr. Andewelt, if you could all four come forward just for the swearing in right now.

If you will all raise your right hands: Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KANNE. I do.

Mr. ALESIA. I do.

Mr. STADTMUELLER. I do.

Mr. ANDEWELT. I do.

Senator SIMON. Judge Kanne, we will take you at this point.

TESTIMONY OF HON. MICHAEL S. KANNE, A NOMINEE TO BE U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Senator SIMON. Judge Kanne, the District Court on which you sit is a busy one. We have talked with attorneys who have practiced before your court and they are generally very positive in their comments.

There is some criticism about a slowness of decisions. Do you have any reaction to that criticism?

Judge KANNE. Well, Mr. Chairman, I consider that there are some valid reasons for delay in deciding cases. One, for example, is a case may be delayed, and I have done so, awaiting what would be a dispositive ruling by the Supreme Court or the Court of Appeals.

Also, the complexity of a case sometimes dictates that slowness and careful thought be applied to it. The third, and what I consider to be a valid reason for a delay, is competing cases, criminal cases which take priority, and a general competition for time in deciding cases which sometimes results in a delay of decision-making.

Senator SIMON. Let me add that the Seventh Circuit already has some problems in regard to disposition of cases. It ranks ninth among the twelve regional circuits in the speed with which it is disposing of cases. Will your presence on the Court slow this process further, or are you going to do what you can to expeditiously but obviously without undue haste move things in a more positive direction?

Judge KANNE. Mr. Chairman, it is my belief that the delay in justice works an unfairness on the litigants, and to the extent possible it would be my intent to speed the process along.

Having said that, it is important in my view that we not be precipitous in making these decisions, but I fully recognize that the litigants and everyone involved suffers when the cases are delayed.

Senator SIMON. One of the duties of a member of the bar is to serve the public generally. I do not have the specific code of ethics here right now.

Judge KANNE. Yes, sir.

Senator SIMON. Can you tell me what you have done in that general area?

Judge KANNE. Well, a variety of things. In my practice by taking pro bono cases, but that has been a long time ago when I was practicing law, and it has changed as time has passed.

One of the things that I now do as a District Judge is try to recruit lawyers to take civil rights cases and other cases for disadvantaged persons who may apply pro se, prisoners in certain cases, and to provide representation for them. I think that is important, an important job of the District Judge, to seek out lawyers. They are not always easy to find, I might add, but some of the lawyers we have secured very good records in representing disadvantaged people.

Senator SIMON. One of the things that we have to convey to people is not only that justice is done but there has to be the perception that justice is done.

Judge KANNE. Yes, sir.

Senator SIMON. The Seventh Circuit Court of Appeals is one of only two Circuit Courts, and you are filling the last vacancy, where all the judges are white male judges. What will you do to give that assurance, that perception that in fact women, minorities, others are going to receive justice before the Circuit Court of Appeals?

Judge KANNE. Well, Mr. Chairman, I have two daughters and that is one incentive I think you see in your own family. I want my daughters, for example, to be able to have all the opportunities that they would have if they were male.

Obviously, insofar as the makeup of the Court, I can do very little about that, but I do not believe that it can be said that I would have any intent but to promote the idea of women on the Court. In fact, in the State of Indiana, in the Southern District, we have a woman recently appointed, Sara Barker, not so recent now, it has been some time past, and I know that there are a number of outstanding women who have joined the Northern District Court in Illinois. I am sure that, given time, the balance will change on the Seventh Circuit as well.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Have you introduced your family yet?

Judge Kanne. Senator Lugar was kind enough to do that, but they did not stand up when he introduced them. If I could do that——

Senator Thurmond. Let them stand up.

Senator Simon. And any other guests you may have.

Judge Kanne. Thank you very much, Senator, I would like to do that.

Would my family please stand? Mr. Chairman, Senator, I am very pleased to have with me today Dr. Mary Margaret Smith, who is Associate Dean and Professor of Political Science at St. Joseph's College, and a colleague of mine when I get involved in teaching constitutional law. She also has been showing us around Washington a little bit. She worked for a time for Carl Albert some years ago.

If Dr. Smith would stand, please.

Also Sue Downard, whose late husband and I, Dr. William Downard, were very good friends and a very strong supporter of mine, has accompanied Dr. Smith. Will she stand as well, please?

Thank you, Senator.

Senator Thurmond. I do not believe there will be any discrimination against females in your family. There had better not be anyway. [Laughter.]

Judge Kanne. I was advised of that earlier, Senator, when they said my bodyguard today consisted of all these women.

Senator Thurmond. Judge Kanne, there is frequently a conflict between deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Judge Kanne. Well, Senator, my fifteen years as a trial judge has been in an effort to apply the law as precedent indicates and avoid imposing my own personal views as to what the law ought to be. I would leave to others to determine how successful I have been over fifteen years, but that has been my primary goal.

As to the opinions of a District judge, I think we are limited to the narrow scope of particular cases and we are not writing to establish precedent, we are merely deciding the case before us and relying on precedent to do it.

Senator Thurmond. The phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not within the scope of their authority. What does the phrase "judicial activism" mean to you?

Judge Kanne. Well, I think judicial activism means to me, Senator, that it is a tendency to usurp the functions of the political branches of government, both as to the Executive and Legislative Branches. The Judiciary has its function and its function is to apply the laws and the Constitution, the laws as developed by the Congress and the Constitution, and attempt, to any extent possible, to avoid becoming a super legislature.

Senator Thurmond. A Federal judge has all the power anyone could desire, the power of life and death, he has power of unlimited authority in civil matters, and at the same time some of them seem to want more power, they want to take over schools, they want to take over hospitals, they want to take over prisons and other State institutions, and that is disturbing to a lot of people. How do you feel about that?

Judge **Kanne**. Senator, when I was here the last time a similar question I think was addressed by some of the candidates. My view is that the Judiciary has enough to do with operating the courts and deciding cases before it.

I must add a caveat, however, Senator, that after that hearing and my subsequent confirmation and appointment, I took over a caseload that included the operation of a jail. When faced with those circumstances, I carried that responsibility out to the best of my ability, given the circumstances of a consent decree which virtually gave the authority to govern the jail to a monitor appointed by the court. It came up as a consent decree, however, we followed through, trying to do it in a conservative a manner as possible, but still exercising the authority of the court. But by and large those matters, in my view, should be left to the Executive and Legislative Branches in State government or the Federal Government.

Senator **Thurmond**. Thank you, Mr. Chairman. I have no more questions.

Senator **Simon**. We thank you very much and we wish you the very best, Judge Kanne.

Judge **Kanne**. Thank you, Mr. Chairman.

[The following material was subsequently supplied for the record:]

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN
EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA
PATRICK J. LEAHY, VERMONT
HOWELL HEFLIN, ALABAMA
PAUL SIMON, ILLINOIS
STROM THURMOND, SOUTH CAROLINA
ORRIN G. HATCH, UTAH
ALAN K. SIMPSON, WYOMING
CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE

MARK H. GITENSTEIN, CHIEF COUNSEL
DIANA HUFFMAN, STAFF DIRECTOR
DENNIS W. SHEDD, MINORITY CHIEF COUNSEL

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

April 28, 1987

Hon. Michael S. Kanne
205 Federal Building
Hammond, Indiana 46320

Dear Judge Kanne:

In order to supplement the record of this afternoon's hearing on your nomination to be U. S. Circuit Judge, please respond to the following additional questions. Since your testimony was taken under oath, your responses should be accompanied by an attestation of their accuracy.

Please send your response to the Judiciary Committee at Room SD-224, Dirksen Senate Office Building, Washington, DC 20510, to the attention of Steven J. Metalitz, Special Counsel. If you have any questions concerning this request, you may call Mr. Metalitz at (202) 224-8191. Thank you for your cooperation.

Sincerely yours,

S/

Paul Simon
United States Senator

encls

QUESTIONS FOR JUDGE KANNE

DISCRIMINATORY CLUBS

Are you a member of any organization that discriminates on the basis of race, gender or religion?

I understand that you are a member of the Curtis Creek Country Club in Rensselaer, Indiana.

Does the Curtis Creek Country Club have any members who are black, or members of other racial minorities?

Do you hold any office in this country club? Are you involved at all in decisions on membership applications?

Do you have any reason to think that the Curtis Creek Country Club has no black or minority members because of any discriminatory membership policy?

As you know, the Commentary to the American Bar Association Code of Judicial Conduct states that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race." You have been a judge in either the state or federal systems for 15 years, so I am sure you have asked yourself whether your membership in this all-white country club is consistent with your obligations under the Code of Judicial Conduct. Are you satisfied that your continued membership in the Curtis Creek Country Club is proper, and remains proper even if you are confirmed as a judge of the Seventh Circuit Court of Appeals?

Will you furnish to the Committee a copy of the by-laws or similar document that sets forth the requirements for membership in the Curtis Creek Country Club?

REVERSALS IN CIVIL RIGHTS CASES

At the Committee's request, you have supplied a list of cases in which your rulings as a trial court judge were reversed by a higher court.

You list eight cases in which your decisions as a federal District Court judge have been reversed by the Seventh Circuit Court of Appeals. Four of those cases -- one-half the total -- involve claims brought by employees under the federal civil rights laws. In each case, you threw the employees out of court. In each case, the Court of Appeals allowed at least some of the plaintiffs to go forward with their cases.

In a fifth case, an arbitrator had ordered an employer to reinstate an employee who had been fired. You refused to enforce the arbitrator's order, but the Court of Appeals reversed your decision and ordered the employee reinstated. So although this was not a civil rights case, it followed the same pattern: you ruled against the employee and the higher court overturned your ruling.

I am sure that employment cases are only a small part of the docket in the District Court where you now sit. But over half of your reversals have come in these cases where you ruled against the employee. You are hardly ever reversed in any other kind of case.

How do you explain this pattern? Why do you think your batting average in employment cases, particularly civil rights cases, differs so dramatically from the rest of your docket?

Do you find civil rights and employment cases particularly difficult?

Rec'd 5-5-87 sjm

UNITED STATES DISTRICT COURT
205 FEDERAL BUILDING
HAMMOND, INDIANA 46320

JUDGE MICHAEL S. KANNE
NORTHERN DISTRICT OF INDIANA

May 4, 1987

Committee on the Judiciary
United States Senate
Room SD-224
Dirksen Office Building
Washington, D.C. 20510

Attention Steven J. Metalitz

Dear Mr. Metalitz:

Enclosed please find my responses to the two additional questions posed in Senator Simon's correspondence of April 28, 1987. Thank you for your assistance.

Very truly yours,

Michael S. Kanne

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Enclosures

ANSWER REGARDING REVERSALS IN CIVIL RIGHTS CASES

In response to your first question, I do not believe that four cases constitute a pattern from which any meaningful conclusion can be drawn. The fact is that my docket consists of a significant percentage of employment discrimination cases and I have been affirmed by the Seventh Circuit when ruling both in favor of and against employees. Moreover, I do not believe that my record in employment discrimination cases differs markedly from that of other federal judges who deal regularly with such cases. Furthermore, three of the cases in question are now pending before me and it would be inappropriate for me to discuss them.

In response to your second question, I find that many civil rights and employment discrimination cases present difficult questions of procedure, law and fact. To some extent, federal laws enacted to protect minority and employee rights have achieved their desired effect and a large percentage of cases involving clear infringements of employee rights are resolved prior to litigation. Thus the federal courts are often presented with complex problems that turn on subtle distinctions of law and fact. Such cases are challenging to a judge and I bring to them, as I do to every case on my docket, all the fairness and impartiality at my command.

I affirm under the penalties of perjury that the foregoing answers are true to the best of my knowledge and belief.

Michael S. Kanne
Judge, United States District Court

ANSWER REGARDING DISCRIMINATORY CLUBS

As I indicated on my questionnaire, I am a member of Curtis Creek Country Club. I am not a voting, but rather a social member. Curtis Creek Country Club is located near Rensselaer in a rural agricultural area of Northwest Indiana. I have lived in this community for over 40 years. Aside from minority students and faculty at St. Joseph's College, there is virtually no black population within a 40-mile radius. I believe that the demographics of the community is the only reason why there are no black or other minority members of the country club.

I hold no office in the country club, nor have I ever been involved in membership decisions.

There exists no reason for me to believe that the absence of black or minority members in Curtis Creek Country Club is a result of any discriminatory membership policy.

I am satisfied that my continued membership in the Curtis Creek Country Club is proper, and would remain proper even if I am confirmed as a judge of the Seventh Circuit Court of Appeals. If, however, I had reason to believe that an absence of black or other minority membership in the country club was a result of invidious discrimination, I would immediately resign.

A copy of the bylaws of Curtis Creek Country Club is attached.

I affirm under the penalties of perjury that the foregoing answers are true to the best of my knowledge and belief.

Michael S. Kanne
Judge, United States District Court

Senator SIMON. James H. Alesia, from Illinois.

TESTIMONY OF JAMES H. ALESIA, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS

Senator SIMON. Mr. Alesia, if there are others besides your immediate family whom you have introduced already that you would like to introduce, this would be an appropriate time.

Mr. ALESIA. Nobody other than my immediate family, Mr. Chairman.

Senator SIMON. We are very pleased to have them here. I assume they are also residents of Illinois?

Mr. ALESIA. Absolutely.

Senator SIMON. All right.

One of the questions I asked the previous nominee was about public service work. In the last five years, could you give me an example of what you have done in the public service area?

Mr. ALESIA. Well, other than representing an occasional person in our firm on a pro bono basis, I have not. Prior to that time, I was an administrative law judge with Social Security and I would say at least fifty percent of the people that appeared before me were disadvantaged people and, as the Chairman well knows, many of those are not represented by counsel, and it was the Job of the administrative law judge to not only decide the case but to make sure that the people without an attorney had their record fully placed in the record for a decision.

I also prior to that time represented an indigent black prisoner on a pro bono basis from the Supreme Court of Illinois who was convicted of armed robbery and sentenced to a 10 to 15 year term, and I successfully had that conviction reversed.

Senator SIMON. You have resigned as a member of the Union League Club, according to information I have.

Mr. ALESIA. Yes, I have.

Senator SIMON. Would you mind setting forth the circumstances of that resignation?

Mr. ALESIA. I joined the Union League Club in 1982. At the time I was there, I was asked on a one on one interview, if I had any problem with their policy which excludes women from membership, I said that I did, I was asked the same question in front of the full membership committee and gave the same answer.

From 1982, up until last month, there was not another vote on admitting women to membership. On Friday, March 20, the vote was announced at about 6 o'clock in the evening that by 44 votes the resolution to open up the membership to women failed to receive the two-thirds needed majority to pass. The following Monday morning, at 9 a.m., I resigned.

Senator SIMON. I would simply commend you. I think it is an example of the kind of sensitivity that public officials should have.

I note that we received ratings from a variety of bar associations, the Chicago Council of Lawyers, the Chicago Bar Association, the Federal Bar Association, the Illinois Bar Association, Cook County Bar Association. What about the process, do you find it a burdensome one to go through to become a Federal judge?

Mr. ALESIA. No, I think it is really a necessity. I think when you are vying for a position as United States District Judge, I think it is incumbent upon the individual to appear before the local bar associations and have the local bar associations have the opportunity not only to interview you but to explore your background and to ask questions of the people before whom you have appeared and also from your opponents. I think it is a good process.

Senator SIMON. One final question, a really important question. My colleague mentioned that you were a Cubs fan. Will White Sox fans find justice in your court? [Laughter.]

Mr. ALESIA. White Sox fans will, and I am also a Bear fan, but the Chicago Cardinals are no longer in Chicago, Senator, so we will not have that problem.

Senator SIMON. All right.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Well, you are fortunate to have the presiding officer here from Illinois. He is an admirer of yours, I understand, and that is very much in your favor.

Mr. ALESIA. Thank you.

Senator THURMOND. And the other Senator here, too, is a fine man.

Let me ask you this question. I have seen some Federal judges yell at lawyers and witnesses and jurors, they just seem to lack judicial temperament and I think that proper judicial temperament is important. I think the judge ought to set the example for others in the way he conducts himself. He does not have to holler at anybody. He has all the power he wants, all he needs. How do you feel about judicial temperament as one of the qualifications of a judge?

Mr. ALESIA. I could not agree with you more, Senator. I have been a trial lawyer for 25 years and certainly I think judicial temperament is an extremely important quality that a Federal District judge should have.

Senator THURMOND. How would you resolve a conflict between your own conscience or your own sense of justice and the fair meaning of a statutorial constitutional provision?

Mr. ALESIA. Well, as a United States District Court judge, if I am confirmed, I am of course obligated to follow the dictates of the Supreme Court of the United States as well as the United States Circuit Court for the Seventh Circuit. My own personal opinions are really irrelevant as to any case before me.

Senator THURMOND. I do not think I have any other questions. I hope you have a fine career on the bench.

Mr. ALESIA. Thank you very much, Senator. I appreciate that.

Senator SIMON. Congratulations to you.

Mr. ALESIA. Thank you, Mr. Chairman.

Senator SIMON. Thank you.

Mr. Stadtmueller, I notice as I was going through the record that you served for 6 years on the Professional Responsibility Committee of the Milwaukee County Bar and for 2 years of that you served as Chairman of that Committee.

As you reflect on where we are in terms of not only the membership of the bar but as well the quality of the judiciary, any general observations?

TESTIMONY OF JOSEPH P. STADTMUELLER, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN

Mr. STADTMUELLER. Well, it was indeed a pleasure and a privilege to particularly have chaired the 30-member committee for a two-year period, Mr. Chairman, and as a result of that experience I began to appreciate even those which more the realities of lawyers and the difficulties that they face in dealing with their clients. It made me much more sensitive to the problems that the practicing bar face, even those which do not rise to the stature of being in violation of the canons of ethics.

I would indicate that it appeared to me in my experience with the committee that most of the problems of a serious nature really evolve around conflicts of interest, lawyers becoming entrepreneurial involved with their clients, and neglect of clients' matter. To a certain extent this raises serious question in terms of the litigants as they appear in court who have counsel who are not as prepared as they ought to be, both procedurally and substantively, and it is a matter that I am very sensitive to, and part of being a good District Court judge is tc be aware of the sensitivities of the problems of litigants and to ensure that when the case does come up for trial or disposition that the litigants are adequately and appropriately represented through the course of that proceeding.

Senator SIMON. Your background is as a prosecutor immediately. All of a sudden you are going to switch roles. Now your responsibility is to see that justice is done. Do you think switching roles is going to be a problem for you? Are you still going to be wearing the prosecutor's hat as a judge?

Mr. STADTMUELLER. Well, I appreciate, Mr. Chairman, that as the United States Attorney and billed as the chief law enforcement officer, if you will, in my district, there is that perception by the public at-large that I do have a prosecution background. However, the reality is that almost 70 percent of the work of the United States Attorneys office generally, and in particular my district, deals with civil litigation as well as the prosecution of criminal cases.

I would also add in response to your question that to myself, being a United States Attorney and as a representative of the people, I really am really cast in a role that is very much like a judge. By that I mean we are sort of the last bastion, if you will, as a lifeline between the public that we serve on the one hand, the victims and the witnesses of criminal activity, but insuring that the cases that are being prosecuted in the courts merit prosecution. There are far more decisions made in the United States Attorneys office on a daily and weekly basis than are ever made in the courts during a similar period. And as a consequence of that whole process, I am extremely sensitive to the value of evidence and the rights of the defendants, and that is clearly cognizable if you consider the fact that during the course of a given year we have between 900 and 1,000 criminal matters presented to our office, of which only about 20 percent are actually prosecuted. So judgmentally we are making decisions constantly with regard to the prosecution of cases.

I would also add that once an indictment is returned, if there are circumstances that have changed in the case from an evidentiary standpoint or the application of a statute, I am not afraid to say that I am wrong and seek a vindication of the defendant's rights and the dismissal of the case.

Senator SIMON. Do you belong to any organization that discriminates in any way.

Mr. STADTMUELLER. I am not aware of any, Mr. Chairman.

Senator SIMON. Do you have any—your immediate family members were introduced, any other friends you would like to introduce?

Mr. STADTMUELLER. Yes, I would like to have my wife, Mary Ellen, stand up, and my son, Jeremy and my daughter, Sarah, and there are a number of other people who have come over to the hearing today that I would like to introduce.

First, one of my former assistants is here who is now with the Criminal Division at the Department of Justice, Ms. Barbara Berman, Barbara, would you stand?

One of my assistants, who is here on vacation this week, was kind enough to drop by the hearing today, Elsa Lamelas and her son Daniel are here.

In addition, my good friend and law school classmate, who is Counsel to the National Council of Farmer Cooperatives, Mr. Jim Krzyminski is here.

Finally, another friend who is affiliated with the House side of the Judiciary Committee, Mr. Michael Remington, who I got to know, who is one of Judge Reynolds' former law clerks, who is now on Congressman Kastenmeier's staff with the House Judiciary Committee, is here. Michael, would you stand?

Thank you for that privilege, Mr. Chairman.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

In his famous dissent in Plessy v. Ferguson, in 1893, Justice John Harlan referred to our Constitution as a colorblind constitution. Would you agree with this characterization?

Mr. STADTMUELLER. I agree totally, Mr. Thurmond.

Senator THURMOND. Since then, there has been more attention given to sex, too, giving females equal opportunity, and in the last few years more attention being given to age, too. So how would you feel, would you say that it is not only color-blind but is sex blind and age blind, too, when it comes to rendering justice?

Mr. STADTMUELLER. I think that there are many circumstances that your words are very applicable and truly profound and I have no difficulty with that whatsoever.

Senator THURMOND. Now, on a question of stare decisis, what in your opinion is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Mr. STADTMUELLER. Well, as a District Court judge, of course, I am obliged to follow the precedent in my case that would exist in the Seventh Circuit and to the extent that there is precedent by the United States Supreme Court, of course, that would be applicable and, failing any precedent either at the Seventh Circuit level or at the Supreme Court level, I would look to the precedent in other circuits dealing with that question.

As a result of being bound by the authority in the circuit or by the Supreme Court, and if I were truly of a belief that the Constitution dictated to the contrary, I would simply be obliged to note in my opinion upholding the applicable statutory scheme as governed by existing authority that I had some reservations about a certain point and leave it to an appellate court to really deal with the question, rather than going native, if you will, on my own.

Senator THURMOND. There are several ways it could be approached and that is one way to do it. Another would be that if you are convinced that it is a violation of the Constitution, the Supreme Court, you know, has reversed itself time and again, and the other way would be to just take the position that, although there have been cases that way that you are convinced are wrong and take another approach. I think you could approach it either way.

I do not have any other questions. I hope you have a fine career on the bench.

Mr. STADTMUELLER. Thank you.

Senator SIMON. Congratulations to you and we wish you the best.

Mr. STADTMUELLER. Thank you, Mr. Chairman.

Senator SIMON. Roger B. Andewelt.

Mr. Andewelt, would you like to introduce your family?

TESTIMONY OF ROGER B. ANDEWELT, A NOMINEE TO BE A JUDGE OF THE U.S. CLAIMS COURT

Mr. ANDEWELT. Yes, please. My wife, Maxine, my daughter, Alexa, my son, Ian, and there is a large group from the Department of Justice here and I will just introduce one and that is my secretary, Geneva Harris.

Senator SIMON. We welcome you here.

As I understand it, you are not admitted to practice at this point before the U.S. Claims Court, is that correct?

Mr. ANDEWELT. That is correct.

Senator SIMON. Have you had any experience with the Claims Court at all?

Mr. ANDEWELT. I have had no experience directly with the Claims Court.

Senator SIMON. How will you prepare yourself to all of a sudden be a judge of the Court of Claims?

Mr. ANDEWELT. Well, I think to some extent I have been preparing myself for a long time in terms of the experience that I have had in my career in the Antitrust Division of the Justice Department, developing many of the skills that I think I will need as a judge before the Claims Court.

More specifically, with respect to the jurisdiction of the Claims Court, I do have some experience with respect to certain areas and that is the patent area, in which they have considerable jurisdiction, but beyond that I have had some conversations with a group of the judges on the court in an attempt to prepare myself, just talking generally about the type of cases that they have been getting.

I have been doing reading on the issues, in addition. I have been taking advantage of some of the video and audio tapes that are made available by the Judiciary Center. I think generally I have been using whatever time I do have available to get better knowledge with respect to the precise details of the issues that are before the court, but I think by and large my experience generally in litigation in dealing with legal issues is the most important part of my preparation.

Senator SIMON. There are some who might look at your background and say, with this background and now as a member of the Claims Court, you will have a pro-government bias. How would you respond to that?

Mr. ANDEWELT. My career has been with the government, but when you work with the government I do not think you identify with the government. I think you become sensitive to the government. I think the government does some things very well, it does some things poorly.

Usually, how well it does or how poorly it does depends upon the individuals within the government that are doing it. I think that my perspective is that the government does do some things well and does do some things poorly, but in all cases it is simply another litigant in cases before the United States Claims Court, and I do not have an identity with one side or the other on these cases. I think there are a lot of very important issues that are presented before the court and they have to be judged exclusively on the merits.

Senator SIMON. Do you belong to any organizations that discriminate in any way.

Mr. ANDEWELT. No, I do not.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, I ask that a statement by Senator D'Amato on behalf of Roger B. Andewelt be inserted in the record.

Senator SIMON. It will be inserted in the record.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR ALFONSE D'AMATO

Roger Andewelt, nominated to the U.S. Claims Court, currently serves as Deputy Assistant Attorney General for litigation in the Antitrust Division of the Department of Justice. In that capacity, he has basic responsibility for the Division's investigative and litigation activities, and is involved in establishing enforcement policies. Mr. Andewelt also served as Deputy Director of Antitrust Division's Operations and Chief of the Division's Intellectual Property Section. For the past decade, he has been involved in formulating executive branch policies on intellectual property and high technology issues.

Roger was born, raised and educated in Brooklyn, New York. He graduated from Brooklyn College in 1967, and then attended the National Law Center at George Washington University from which he obtained his J.D. degree in 1971.

I believe Roger Andewelt is a man of dedication and ability who has served his country with distinction in the important area of the administration of justice. I endorse his nomination by the President to the Claims Court and strongly recommend that the committee confirm him to this position.

Senator THURMOND. Mr. Andewelt, the jurisdiction of the Claims Court includes limiting authority to issue pre-award injunctions in government contract cases. Do you believe that sufficient standards exist to guide the Claims Court judges in the exercise of this authority?

Mr. ANDEWELT. Yes, I do. I know there was a question early on with the court with respect to how it would handle these kind of injunctive matters. But I think the court essentially adopted the same standards as the D.C. Circuit and on appeal to the Court of Appeals for the Federal Circuit which handles appeals from the United States Claims Court, they have affirmed those general standards. So I think there is an entire body of law that relates to these preliminary injunctions, and I think it is an adequate body of law to deal with the issues.

Senator THURMOND. I have observed from your biography that you have been in the Justice Department since 1972.

Mr. ANDEWELT. That is right, Senator.

Senator THURMOND. And you have served as trial attorney in the Appellate Section for two years, trial attorney in the Intellectual Property Section for four years, Assistant Chief, 1981 to 1984, Deputy Director of Operations, 1984 to 1986, and Deputy Assistant Attorney General for Litigation from June 1986 to the present.

So you feel your qualifications are adequate to perform these duties, do you not.

Mr. ANDEWELT. Yes, I do. I think I have got a broad spectrum of litigation experience and I think that has well equipped me for this challenge.

Senator THURMOND. You appear to be well qualified for the position and I hope you enjoy your service on the Claims Court.

Mr. ANDEWELT. Thank you, Senator.

Senator SIMON. Thank you very much and we wish you the best.

Mr. ANDEWELT. Thank you, Mr. Chairman.

Senator SIMON. Let me also note for the record that each nominee before the Committee has completed an extensive questionnaire of his qualifications, experience and financial situation. Publicly available portions of these questionnaire responses will be printed in the record of this hearing and we will also keep the record open for a limited time for follow-up questions of the nominees and for additional questions that may be submitted by members of the Committee who are unable to be present this afternoon.

Senator Thurmond, we thank you for being here and we give our congratulations to the nominees.

The hearing stands adjourned.

[Whereupon, at 3:28 p.m., the committee was adjourned.]

BIOGRAPHY

MICHAEL S. KANNE

Birth:	December 21, 1938	Rensselaer, Indiana
Legal Residence:	Indiana	
Marital Status:	Married	Judith Ann Kanne 2 children
Education:	1957 - 1958	St. Joseph's College
	1958 - 1962	Indiana University B.S. degree
	1965 - 1968	Indiana University School of Law J.D. degree
Bar:	1968	Indiana
Military Service:	1962 - 1965	United States Air Force
Experience:	1968 - 1971	Nesbitt & Fisher Associate
	1971 - 1972	Private practice Rensselaer, Indiana
	1972 - 1982	Judge, 30th Judicial District Jasper County Circuit Court Rensselaer, Indiana
	1976 - present	St. Joseph's College Lecturer, Constitutional Law
	1982 - present	United States District Judge Northern District of Indiana
Office:	205 Federal Building Hammond, Indiana 46320 219 937-5292	
Home:		

To be United States Circuit Judge for the Seventh Circuit

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

   Michael Stephen Kanne

2. Address: List current place of residence and office address(es).

   (Office): U.S. District Court
   205 Federal Building
   Hammond, Indiana 46320

3. Date and place of birth.

   December 21, 1938
   Rensselaer, Indiana

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married: Judith Ann (Stevens) Kanne
Artist - Self-employed
605 Milroy Ave.
Rensselaer, IN 47978

Instructor - part-time
St. Joseph's College
Rensselaer, IN 47978

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Undergraduate:

St. Joseph's College 1957-1958
(Transferred to Indiana University)

Indiana University 1958-1962
B.S. Degree - 1962

Post Graduate:

Boston University 1963
(Air Force School - Completed Program)

Law School:

Indiana University 1965-1968
J.D. Degree - 1968

Judicial Education:

National Judicial College 1974
(General Jurisdictional Program)

University of Birmingham (England) 1976
(Judicial Administration Program)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Employment:

United States Air Force
Officer (1962-65)

Nesbitt and Fisher (Law Firm)
Associate (1968-71)

Sole Practitioner (Law Office)
(1971-72)

St. Joseph's College
Instructor in Constitutional Law - Part-time
(1976-Present)

State of Indiana
Judge, 30th Judicial Circuit
(1972-1982)

United States Courts
Judge, U.S. District Court
(1982-Present)

Nonprofit Affiliation as Officer or Director:

Camp Kanne, Inc.; Boy Scout Camp
(Secretary 1971-Present)

Jasper County Bar Association
(President 1972)

St. Joseph's College Alumni Association
(Member of Board of Directors 1973-74)

American Lung Association of
Northwest Indiana
(Member of Board of Directors 1974-76)

Boy Scouts of America; Sagamore council
(Member of Executive Board 1976-Present)

Indiana Judges Association
(Vice-President/President Elect 1980-82;
Secretary-Treasurer 1978-80;
Board of Managers 1976-78)

Indiana State Bar Association
(Member of Board of Managers 1977-79)

Indiana University Law School Alumni
Association
(President 1979-80; Vice-President 1978-79;
Secretary 1977-78; Board of Directors 1975-77)

St. Augustine Church
(Parish Council President 1979-81)

St. Joseph's College
(Member of Board of Trustees 1984-Present)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes
Active Duty - June 29, 1962 to June 15, 1965
United States Air Force
1st Lieutenant
Serial Number AO3120252
Honorably Discharged

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Fellow, Indiana Bar Foundation - 1986

Presidential Citation from Indiana State
Bar Association - 1978

Distinguished Alumni Service Award from
St. Joseph's College - 1973

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Indiana Judges Association
(Vice-President/President Elect 1980-82;
Secretary-Treasurer 1978-80;
Board of Managers 1976-78)

Indiana State Bar Association
(Board of Managers 1977-79; Member
of Committee on Improvements in
the Judicial System, and Committee
on Legal Education 1979-1982)

American Bar Association
(Delegate, National Conference of State
Trial Judges, 1981; Member of State
Judicial Association Committee 1980-1982)

Indiana Judicial Conference
(Chair, Judicial Reform Committee
1976-1982)

Board of Visitors of Indiana
University School of Law (1979-1981)

Jasper County Bar Association
(President 1972)

Indiana University Law School Alumni
Association (President 1979-80; Vice-
President 1978-79; Secretary 1977-78;
Board of Directors 1975-77)

American Judicature Society

Lake County Bar Association

Federal Judges Association

Committee on Social Security Problems
Seventh Circuit
Judicial Council

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

    The following organizations to which I belong engage in lobbying activities before public bodies:

    Indiana State Bar Association
    Federal Judges Association

    The following are additional organizations to which I belong:

    Indiana Society of Chicago
    Curtis Creek Country Club
    Lambda Chi Alpha Fraternity
    Rotary (Honorary Member)
    National Lawyer's Club

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

    Indiana Supreme Court, May 22, 1968

    United States District Court for the
    Southern District of Indiana, May 22, 1968

    United States District Court for the
    Northern District of Indiana, July 18, 1968

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

    None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent - October 3, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

1972. Temporary Judge, 30th Judicial Circuit of Indiana. Appointed by the Indiana Supreme Court November 14, 1972. This is a court of unlimited jurisdiction .

1972-1982. Judge, 30th Judicial Circuit of Indiana. Appointed by Governor of Indiana November 30, 1972. Elected to that office in 1974 and 1980. This is a court of unlimited jurisdiction .

1982-Present. Judge, U.S. District Court, Northern District of Indiana. Appointed by the President February 9, 1982. Jurisdiction as set forth in 28 U.S.C. § 1330, et seq.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(1) The following are ten published opinions I have issued dealing with significant issues:

County Department of Public Welfare v. Stanton, 545 F.Supp. 239 (N.D. Ind. 1982);

Stanley v. Indiana Civil Rights Commission, 557 F.Supp. 330 (N.D. Ind. 1983), aff'd, 740 F.2d 972 (7th Cir. 1984);

Gonzales v. Union Carbide Corp., 580 F.Supp. 249 (N.D. Ind. 1983);

Zuranski v. Anderson, 582 F.Supp. 101 (N.D. Ind. 1984);

U.S. v. Chiattello, 599 F.Supp. 970 (N.D. Ind. 1985), cited with approval in U.S. v. Greenberg, 772 F.2d 340 (7th Cir. 1985);

Citicorp v. Bank of Lansing, 604 F.Supp. 585 (N.D. Ind. 1985);

Gary Sheet & Tin Employees Federal Credit Union v. U.S., 605 F.Supp. 916 (N.D. Ind. 1985);

Ezpeleta v. Sisters of Mercy Health Corp., 621 F.Supp. 1262 (N.D. Ind. 1985), aff'd, 800 F.2d 119 (1986);

DeHoyos v. John Mohr & Sons, 629 F.Supp. 69 (N.D. Ind. 1984); aff'd sub nom., Black v. Henry Pratt Co., 778 F.2d 1278 (1985);

Steelworkers of America v. South Bend Lathe, Inc., 633 F.Supp. 1342 (N.D. Ind. 1986).

(2) I have presided over and entered final judgment in approximately 11,100 cases in over 14 years as a trial judge. An estimated 170 of those 11,100 cases were appealed. Of the 170 appealed cases 17 were either: (A) affirmed in part and reversed in part; or (B) reversed. Those 17 cases are the following:

(A) Affirmed in part and reversed in part:

State Board of Tax Commissioners v. Farmers Co-operative Company of Remington, 370 N.E.2d 389 (Ind. App. 1977). This action involved a review of the State Tax Board assessment of a taxpayer's business property. The Court of Appeals affirmed my ruling that the taxpayer was entitled to the contested exemption, but directed referral to the Tax Board for reassessment rather than allow the tax return to stand as originally filed.

State v. Tabler, 381 N.E.2d 502 (Ind. App. 1978), transfer denied, 395 N.E.2d 787 (Ind. 1979) (Dissent). An action was brought by multiple plaintiffs against the Indiana Highway Commission for wrongful death and injuries. The claims were based on highway design and maintenance. Following a jury trial I found that the award of damages was inadequate based on the death and extreme nature of the injuries. I ordered a new trial on the issue of damages only unless the State agreed to additur totaling $822,500. The Court of Appeals affirmed my finding of inadequate damages, but established a new standard for the granting of a new trial on damages only and remanded for new trial on all issues. One justice of the Supreme Court, in dissent on transfer, rejected the Court of Appeals' position. On remand the case was retried and a verdict of over One Million Dollars was returned.

Yunker v. Porter County Sheriff's Merit Board, 382 N.E.2d 977 (Ind. App. 1978). A police officer, alleging due process violations, sought review of an administrative board's decision to dismiss him for official misconduct. I upheld the decision of the board. The Court of Appeals affirmed my ruling upholding the board's decision, but directed that a "technical defect" in the board's findings should be remanded to the board for correction.

Carter v. State, 424 N.E.2d 1047 (Ind. App. 1981). Defendant was convicted of reckless homicide and causing death by operating a motor vehicle while intoxicated. Separate sentences were imposed as to both offenses. The Court of Appeals affirmed the convictions but remanded for a single sentence.

State ex rel. Miecznikowski v. City of Hammond, 448 N.E.2d 1239 (Ind. App. 1983). Firefighters sought review of an administrative board's decision to demote them. I found that their due process rights had not been violated, that the board's findings were sufficient, affirmed the demotions and denied the firefighters' request for declaratory and injunctive relief. The Court of Appeals found that the findings of fact by the administrative board were inadequate, but affirmed the remainder of my decision. The case was remanded for return to the board for further findings.

Babrocky v. Jewel Food Co. & Retail Meatcutters, 773 F.2d 857 (7th Cir. 1985), dec. on remand, 645 F.Supp. 1396 (N.D. Ind. 1986). Female meatwrappers brought a complaint against their union and employer alleging LMRA and Title VII violations. I granted summary judgment in favor of the union and employer as to all claims. The Court of Appeals affirmed the summary judgment as to some claims and reversed as to others. On remand, following trial before another judge, it was held that the employees failed to establish a prima facie case. Judgment was entered in favor of the union and employer on all claims remaining.

Shondel v. McDermott, 775 F.2d 859 (7th Cir. 1985). Discharged city employees brought § 1983 actions against city officials alleging their terminations were for political reasons. Of the two employees involved in the appeal, I held that neither was entitled to relief because, one's First Amendment rights were not infringed and the other had violated the Hatch Act. The Court of Appeals affirmed the first judgment and reversed the second declining to apply equitable defenses in a First Amendment claim.

(B) Reversed:

Bailey v. State, 314 N.E.2d 755 (Ind. App. 1974). Defendant was convicted of auto theft. On appeal defendant raised matters not addressed at trial concerning defective charging affidavit. The Court of Appeals found that the affidavit was defective and reversed.

Soltes v. School City of East Chicago, 344 N.E.2d 865 (Ind. App. 1976). Treasurer/bookkeeper brought an unspecified action for wrongful discharge from a school. I dismissed the case under Trial Rule 12(b)(6) for plaintiff's failure to state a claim. The Court of Appeals reversed and established a new standard that a claim could not be dismissed when there is any set of facts, even though not pled, which would support recovery.

Industrial Disposal v. City of East Chicago, 407 N.E.2d 1203 (Ind. App. 1980). An action for inverse condemnation was brought against the City after a buried water main was discovered by the purchaser of real estate. Summary judgment was entered by me in favor of the City on the basis that the City held a license that could not be revoked absent returning it to status quo or paying adequate remuneration. The Court of Appeals disagreed and reversed.

State Bd. of Beauty Culturists, Etc. v. Nuzzo, 435 N.E.2d 311 (Ind. App. 1982). Unsuccessful applicants for a license to practice electrolysis brough action against the state licensing board. A conflict existed between two statutory schemes as to which governed a judicial review of administrative decisions of the State Board. I selected the scheme advocated by the petitioners, denied the State Board's motion for summary judgment and certified the matter for interlocutory appeal. The Court of Appeals selected the conflicting statutory scheme and reversed.

Jensen v. State Board of Tax Commissioners, 763 F.2d 272 (7th Cir. 1985). Having agreed that they were violating the constitutional rights of jail inmates, county authorities were ordered by me to take remedial action. The county sought to raise local taxes to finance jail improvements. The State Tax Board prohibited the local tax increase. The county petitioned for an order mandating the State to allow the tax increase. I found the State was indirectly causing continuation of the violations of the inmates constitutional rights, and that the Eleventh Amendment was not applicable.

I directed the State to allow the tax increase. The Court of Appeals found that the Eleventh Amendment applied and reversed.

Meeks v. Grimes, 779 F.2d 417 (7th Cir. 1985). Former city court bailiffs brought action alleging that they were terminated for interparty political activities - supporting the losing candidate for city judge in the primary election. I found that the bailiffs' animosity to the newly elected judge and confidentiality-security requirements permitted termination. The Court of Appeals reversed and remanded for further findings on the working relationship between the judge and the bailiffs.

U.S. v. Dominquez, 783 F.2d 702 (7th Cir. 1986), dec. on remand, 636 F.Supp. 1522 (N.D. Ind. 1986). Criminal defendants appealed from an order detaining them without bail pursuant to the Bail Reform Act. After revoking the magistrate's detention order I conducted a de novo hearing and entered another detention order based on the presumption in § 3142(e). The Court of Appeals reversed and remanded for additional findings. On remand both defendants were found to be a danger to the community and one was found to be a threat to a witness. Bail pending trial was denied.

Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986). An emergency room physician, employed by a private contractor to provide services to a public hospital, brought an action for unlawful termination of employment with the private contractor and for loss of hospital privileges based on denial of First Amendment rights. Through error, and contrary to practice, I resolved the claims against both public and private defendants in a single summary judgment, in abbreviated fashion, without setting forth an explanation of the procedural or substantive basis for the decision. The Court of Appeals reversed an obviously defective judgment.

E. I. DePont DeNemours v. Grasselli Employees Ass'n, 790 F.2d 611 (7th Cir. 1986). An employee, while under the influence of illegal drugs, attacked his supervisor and another employee and damaged company property. The employee was discharged. An arbitrator ordered reinstatement of the employee. The employee's association sought enforcement of the arbitrator's reinstatement order. I found the arbitrator did not base his decision on the collective bargaining agreement, but substituted his personal notions of right and wrong, and thus the reinstatement order should be vacated. The Court of Appeals disagreed with my findings and reversed, enforcing the reinstatement.

Vaughn v. General Foods Corp., 797 F.2d 1403 (7th Cir. 1986). A husband and wife franchisee of Burger Chef brought an action against the parent corporation, General Foods, for fraud. At trial a jury found that General Foods' secret dealings had misled franchisees and defrauded them. The jury awarded actual damages of $4.8 million and punitive damages of $9.2 million. I upheld the jury verdict and General Foods appealed. The Court of Appeals held that the facts did not support a finding of fraud and reversed.

Two cases were initially reversed by the Indiana Court of Appeals, however, the Indiana Court of Appeals was, in turn, reversed by the Indiana Supreme Court and thus the following cases were ultimately affirmed: State, Department of Revenue v. George, 388 N.E.2d 600 (Ind. App. 1979), rev'd, 401 N.E.2d 680 (Ind. 1980); Crestwood Park v. Apostal, 413 N.E.2d 654 (Ind. App. 1980), rev'd, 431 N.E.2d 789 (Ind. 1982). Additionally, in Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983), the judgment was affirmed however, the amount of the award was reduced. In another case, Beach v. Owens-Corning Fiberglas Corp., 728 F.2d 407 (7th Cir. 1984), the Court of Appeals, adopting my rationale in Gonzales v. Union Carbide Corporation, 580 F.Supp. 249, 251-52 (N.D. Ind. 1983), revised its opinion and affirmed on the basis set forth in Gonzales, rather than on the original premise.

(3) The following are opinions on federal or state constitutional issues together with cites to appellate rulings where applicable:

AAFCO Heating and Air Conditioning Company v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974), cert. denied, 424 U.S. 913 (1976);

Motley v. CBS, No. H 79-458, (N.D. Ind. Sept. 17, 1982);

County Department of Public Welfare v. Stanton, 545 F.Supp. 239 (N.D. Ind. 1982);

Jensen v. County of Lake, H 74-230 (N.D. Ind. Jan. 16, 1985), rev'd sub nom., Jensen v. State Board of Tax Commissioners, 763 F.2d 272 (7th Cir. 1985).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1972. Attorney for City of Rensselaer (appointed)

I have not been an unsuccessful candidate for
any elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk:

No.

2. whether you practiced alone, and if so, the addresses and dates;

Sole practice 1971-72
Suite 5
1st Federal Building
Rensselaer, IN 47978

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Associate 1968-1971
Nesbitt & Fisher
Rensselaer, IN 47978
(Partnership now dissolved)

Instructor/Lecturer in Constitutional Law - Part-time
1976-Present
St. Joseph's College
Rensselaer, IN 47978

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Prior to becoming a state court judge in 1972, I was general practitioner in civil, criminal and probate matters.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients were individuals and small corporations and businesses.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Prior to my judicial appointment in 1972 I appeared in court with some regularity.

2. What percentage of these appearances was in:

(a) federal courts;

One percent.

(b) state courts of record;

Ninety percent.

(c) other courts.

Nine percent.

3. What percentage of your litigation was:

(a) civil;

Eighty-five percent.

(b) criminal.

Fifteen percent.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately eighty.
Eighty percent as sole counsel and twenty percent as associate counsel.

5. What percentage of these trials was:

(a) jury;

Five percent.

(b) non-jury.

Ninety-five percent.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Zehr v. Daykin, 153 Ind. App. 537, 288 N.E.2d 174 (1972).

Four certificates of deposit were issued by a bank and payable to a father and his son (Zehr) as "joint tenants with right of survivorship". The certificates were paid for by the father. No bank signature cards were signed by either the father or the son. The certificates were placed in a lock box owned by the father and he received the interest. After the father's death the bank delivered the certificates into the possession of the son and paid him the interest. The sister (Daykin) then claimed there was not a valid gift of the certificates from the father to the son because of failure of delivery and failure to sign signature cards.

The trial court held for the sister and declared the gift invalid. The Court of Appeals in a divided opinion affirmed the trial court. The holding of the majority in the Zehr case was subsequently overruled by the Supreme Court and the opinion in the dissent became the law. Moreover, as a result of this litigation Indiana statutes were amended to eliminate the delivery requirement.

If the "gift theory" originally determined to be the law had been permitted to stand, banks and individuals attempting to make gifts through the use of joint certificates of deposit would have encountered considerable difficulty.

Zehr, the son, was represented by me on appeal, I took over the case from another attorney after trial and personally carried out all appellate work.

The case was decided on appeal on October 25, 1972, and was heard by the Indiana Court of Appeals, Third District. The majority opinion was written by the Honorable Allen Sharp and the dissenting opinion by the Honorable Robert H. Staton. Opposing counsel was William J. Moriarty, Jr., 6 North Cullen Street, Rensselaer, Indiana (219) 866-4158.

2. Jasper County Board of Aviation Commissioners v. Wingad.

Aviation board sought to appropriate air space at the end of an airport runway for safe descent, and ascent of aircraft above defendant's real estate. The jury found in favor of the aviation board and the court entered judgment appropriating the air space without cost to the aviation board.

The significance of this case relates to the somewhat unusual aspect of condemning air space for public use and the fact that existing aviation statutes were used to avoid any appropriation costs.

The aviation board was represented by my firm of Nesbitt & Fisher and I participated as co-counsel in trial preparation and litigation.

Jury trial was held on November 6 and 7 of 1968 in the Jasper Circuit Court with the Honorable Moses Leopold presiding. Lead counsel was John R. Nesbitt, 116 N. Front Street, Rensselaer, Indiana. (219) 866-5168. Opposing counsel was Dale Shoup, of Hammond, now deceased.

3. Farm Bureau Insurance Co. v. Clinton, 149 Ind. App., 269 N.E.2d 780 (1971)

Farm Bureau Insurance, under subrogation, filed an action against Clinton alleging wrongful death. Clinton filed a motion to dismiss under Trial Rule 12(B)(6) which was granted by the trial court on the ground that the complaint did not sufficiently state a claim for relief. On appeal the appellate court reversed the trial court on the basis of the sufficiency of the complaint under the new notice pleading.

This was the first case in Indiana to be decided on appeal with regard to the (then) new procedural rules, and more particularly the requirements under Trial Rule 12(B)(6) relating to the sufficiency of facts in a complaint to state a claim for relief. This case established a clear departure from prior pleading requirements.

Clinton was represented by me on appeal. I took over the case entirely during the appeal when co-counsel became ill, and I personally carried out the appellate work.

The case was decided on appeal on May 27, 1971, and was heard by the Indiana Appellate Court, Division No. 1. The opinion was written by the Honorable Joe W. Loudermilk. Opposing counsel was Frank J. Pekofski, 3637 Grant Street, Gary, Indiana. (219) 867-8105. Co-counsel was Dale S. Ellis (Address Unknown).

Because my law practice was terminated over 14 years ago when I became a state judge, it has been extremely difficult to locate records to document, as required, other litigated cases. In general, aside from those set forth above, most of my other litigated cases as a lawyer were not of great significance. They involved personal injury, contract disputes, zoning and divorce. However, the following are additional significant cases which I handled as a state trial judge.

4. AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974), cert. denied, 96 S. Ct. 1112, 424 U.S. 913, 47 L. Ed. 2d 318.

The "Gary Post Tribune" published a series of ten articles concerning an electrical fire which caused the death of two small children. AAFCO had installed a furnace in the home three weeks before the fire. The articles reported that no permit had been obtained by AAFCO and that a fire official had observed that "a heavy duty blower on the furnace may have caused an overload in the electrical service" which ignited the fire.

AAFCO filed a libel complaint for $250,000.00 in actual damages and $500,000.00 in punitive damages. Northwest Publications, Inc., publishers of the "Gary Post Tribune", filed its answer which relied upon the grounds of truth and qualified privilege. Northwest then filed a motion for summary judgment. Following a hearing on the motion I found in favor of Northwest Publications, Inc., and entered summary judgment against AAFCO on the basis that no libel had been committed as a matter of law.

The summary judgment was affirmed on appeal and certiorari to the U.S. Supreme Court denied.

5. Fleetwood Corp. v. Mirich, 404 N.E.2d 38 (Ind. App. 1980).

A group of physicians organized a corporation which operated an extended health care clinic. From its inception Fleetwood was plagued by administrative mismanagement. To correct the situation the board of Directors hired an administrator by the name of Brown. Through his efforts the financial picture improved. Plans were then developed to expand the center from 80 to 100 beds but outside financing was needed. Misrepresenting the actual value of the stock and fraudulently advising them they had to sell, Brown approached a number of physician shareholders and indicated that he would buy the stock. In fact the purchases were carried out with corporate funds and the purchased shares were redistributed to the remaining shareholders including Brown.

Five of the physicians who were defrauded filed an action against Fleetwood Corporation and Brown. Upon trial the jury returned a large verdict in favor of the defrauded physicians.

Fleetwood Corporation filed an appeal and the Court of Appeals upheld the verdict in an opinion that discussed fiduciary duties of directors and fraud.

6. Taggart v. State, 382 N.E.2d 916 (Ind. 1978).

Taggart was attempting to establish exclusive territory for a gambling operation in Northwest Indiana. To make clear the consequences to those who would not cooperate he had members of his organization kill selected individuals. At Taggart's direction organization members carried out a series of brutal murders. Taggart was found guilty and sentenced to life imprisonment.

An appeal was taken to the Indiana Supreme Court and the convictions upheld.

7. City of Gary v. State ex rel, Condron, 406 N.E. 2d 1231 (Ind. 1980).

Condron was employed by the City of Gary as a detective on the Gary Police Department. Condron during his official duties came into possession of tape recordings between a radio dispatcher and two police officers. The police commission used the tapes as evidence in disciplinary hearing and then directed Condron to retain possession of the tapes until further order of the commission. The Chief of Police thereafter ordered Condron to turn over the tapes to him. Condron refused in obedience to the order of the commission. The Chief then suspended Condron from pay and duty. Condron appealed the suspension to the commission and then at a disputed hearing the commission ordered Condron reinstated with rank and pay restored. The Chief of Police refused to comply with the order of the commission.

Condron filed a complaint requesting the court to mandate the City of Gary to comply with the order of the commission. Condron then filed a motion for partial summary judgment. Following a hearing on the motion I found in favor of Condron and against the City of Gary and ordered Condron reinstated as a police officer and back pay restored.

The City of Gary appealed. The Court of Appeals affirmed the granting of the summary judgment in favor of Condron.

8. Palmowski v. Town of New Chicago, 411 N.E.2d 687 (Ind. App. 1980).

Palmowski brought a class action suit on behalf of the police officers of New Chicago, Indiana, against the Town Board of New Chicago. The issue was a matter of statutory interpretation. Palmowski claimed he and other officers were entitled to the same minimum salary as that paid to policemen of cities of the fifth class. The town claimed that although its population was within the parameter for a fifth class city it had never elected to become so classified. The statute required interpretation as to whether or not the legislature intended to incorporate provisions for police officers of towns into the minimum wage provisions for police officers of cities.

Upon trial of the case to the court, I found that the legislature had not intended the minimum wage provisions for police officers of cities of the fifth class to be engrafted into wage provisions for towns.

Palmowski appealed and a divided court found the interpretation to be correct and affirmed the decision.

9. State of Indiana v. David Smith, 420 N.E.2d 1225 (Ind. 1981).

Smith was the youngest of four men charged with multiple murders of four brothers in a home invasion at Hollandsburg, Indiana. Upon trial to a jury he was convicted on all counts. He was sentenced to life imprisonment on all counts.

Known widely as the "Hollandsburg Murders", the case of David Smith is significant because of the extensive public and media interest and the issue of pretrial publicity. This trial, I believe, was an example wherein the use of change of venue and proper jury selection methods eliminates the damaging conflict between a free press and the right of the defendant to a fair trial. It demonstrates that through the use of existing procedures courtrooms need never be closed to the media.

The case was affirmed by the Indiana Supreme Court.

10. Middelkamp v. Hanewich, 364 N.E.2d 1024 (Ind. 1977).

This case involved a variety of important procedural matters, some of first impression in Indiana. I was required to interpret Indiana trial rules, specifically the application of Rule 12(B) and its relationship to Trial Rule 56. The theory of res judicata and its application to Trial Rule 13 relating to compulsory counterclaims was also a novel issue.

Summary judgment was granted in favor of Hanewich. An appeal was taken by Middelkamp. The Indiana Court of Appeals reviewed the procedural issues and affirmed the summary judgment.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The most significant legal activities I have pursued concern public service as a state and federal trial judge. I have dealt with a large number of cases which range widely over the legal spectrum, including the following: Criminal: Organized Crime - International Drug Smuggling; Political and Judicial Corruption; Business Fraud; Tax Fraud; Murder; Armed Robbery; Kidnapping; Rape; Burglary; and, Arson. Civil: Antitrust; Discrimination; Civil Rights; Contract Disputes; Labor Disputes; Stock Fraud and Shareholders Dispute; Personal Injury; Environmental Issues; Consumer Protection; Libel Actions Against Media; Medical and Legal Malpractice; Land Use and Zoning Review; and, Class Actions in a variety of areas.

Outside my work as a trial judge I chaired a state judges committee on judicial reform. Published work of the committee has formed the basis of recently proposed legislation which would restructure the trial court system in Indiana. I've also been involved in continuing education for lawyers and judges, serving as a faculty member, seminar participant and moderator in such areas as trial advocacy and media - court relations.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Described all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I will adhere to the requirements of 28 U.S.C. § 455 and the Code of Judicial Conduct for United States Judges.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   Yes. Continue part-time teaching of constitutional law at St. Joseph's College.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   Net Worth Statement is attached hereto.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand and in banks	16,500.00
U.S. Government securities—add schedule	3,900.00
Listed securities—add schedule	1,770.00
Unlisted securities—add schedule	8,000.00
Accounts and notes receivable:	
Due from relatives and friends	3,500.00
Due from others	
Doubtful	
Real estate owned—add schedule	120,000.00
Real estate mortgages receivable	22,300.00
Autos and other personal property	31,500.00
Cash value—life insurance	
Other assets—itemize:	
Total assets	207,470.00

LIABILITIES	
Notes payable to banks—secured	
Notes payable to banks—unsecured	
Notes payable to relatives	
Notes payable to others	
Accounts and bills due	2,300.00
Unpaid income tax	
Other unpaid tax and interest	
Real estate mortgages payable—add schedule	76,800.00
Chattel mortgages and other liens payable	
Other debts—itemize:	
Visa (Charge Acct.)	1,200.00
Total liabilities	80,300.00
Net worth	127,170.00
Total liabilities and net worth	207,470.00

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	
On leases or contracts	
Legal Claims	
Provision for Federal Income Tax	
Other special debt	

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

Scheduled Items:

U.S. Government Securities:	Series E Savings Bonds	3,900.00
Listed Securities:	Mutual Funds - 20th Century Select	355.00
	Fidelity Magellan	1,415.00
Unlisted Securities:	40 Shares of State Bank of Rensselaer Stock valued at	8,000.00
Real Estate Owned:	Residence, Rensselaer, Indiana	120,000.00
Real Estate Mortgage:	Mortgage on Residence held by State Bank of Rensselaer	76,800.00

DOJ-1978-10

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The róle of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Recurrent and justified criticism of judicial activism is the result of incursions into policy areas properly left to the political branches of government. The legislative and executive branches have the right and responsibility to carry out the will of the electorate. It is the duty and responsibility of the judiciary to resolve specific cases or controversies in accordance with constitutional and statutory directives. It is my position that the judiciary must exercise restraint and refrain from an interventionist role in matters which call for political solutions. Courts should not act as a superlegislature or superexecutive.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I have been involved in a variety of volunteer activities over the past years which have as their basis equal justice under law. These activities range from participating in seminars and teaching programs to working in legal and judicial organizations. For example, I have: served as a faculty judge for the National Institute for Trial Advocacy for over ten years; given numerous presentations to judges groups over the years on a variety of topics; served as a faculty advisor at the National Judicial College; chaired state judges' committees dealing with judicial reform and sentence restructuring; and served on bar association committees dealing with improvements in legal education and the judicial system. Perhaps most importantly my efforts as a trial judge over fourteen years have been devoted to the goal of equal justice under law. During this period hundreds of persons from ethnic and racial minorities have appeared in my court as lawyers and parties in both civil and criminal matters. I believe my record as a judge would show that I have administered justice fairly and without regard to any racial, ethnic or sex distinctions.

With regard to providing pro bono legal representation to the disadvantaged, that activity is regularly carried out in the course of my seeking counsel for litigants in civil rights actions. I also encourage new lawyers to take cases in Civil Rights litigation. Moreover, although there is minimal payment for services, we also seek qualified counsel to represent indigents in criminal cases. Prior to becoming a judge I provided free legal counsel to disadvantaged persons as a routine part of my practice.

Rec'd 2/6/87
RP

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
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Chicago, Illinois 60611
(312) 988-5000

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Chicago, IL 60611

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Lincoln, NE 68501

NINTH CIRCUIT
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1900 Washington Bldg.
Seattle, WA 98101

Samuel L., Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: MICHAEL S. KANNE
United States Court of Appeals
for the Seventh Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Michael S. Kanne for appointment as Judge of the United States Court of Appeals for the Seventh Circuit.

Our Committee is unanimously of the opinion that Judge Kanne is "Qualified" for this appointment.

Sincerely,

Robert B Fiske Jr

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

Chicago Council of Lawyers

One Quincy Court Building • Suite 800 • 220 South State Street • Chicago, Illinois 60604 • (312) 427-0710

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Malcolm C. Rich
Executive Director

February 10, 1987

Senator Paul M. Simon
462 Dickson Building
Washington, D.C. 20510

Dear Senator Simon:

The Chicago Council of Lawyers has evaluated the qualifications of Judge Michael S. Kanne, now a federal district court judge in Hammond, Indiana, for appointment to the United States Court of Appeals for the Seventh Circuit. The Council's evaluation of Judge Kanne consisted of interviews with lawyers who have appeared before Judge Kanne, a review of appellate court opinions reviewing Judge Kanne's work as an Indiana and as a federal trial judge, a review of opinions written by Judge Kanne, and an interview with Judge Kanne.

Before going into the substance of the Council's evaluation of Judge Kanne, we wish to set forth the standards against which Judge Kanne's qualifications were measured. We believe that a judge must be a person of the highest integrity and must be able to rule fairly on the issues presented to him without regard to political or personal affiliations. Moreover, a judge must have an appropriate judicial temperament. In order to be found qualified for appointment to the United States Court of Appeals, a candidate must have demonstrated excellence by performance in practice, in judicial experience, or in scholarship. Measured against these standards, the Council finds Judge Kanne qualified to be a judge of the United States Court of Appeals for the Seventh Circuit.

Judge Kanne received his law degree from the University of Indiana-Bloomington in 1968. He was in private practice from 1968 until 1972 when he was appointed as judge in the 30th Judicial Circuit of Indiana. He remained an Indiana Circuit Court judge until 1982 when he was appointed to the United States District Court in Hammond, Indiana, where he presides today.

In state court, Judge Kanne heard a variety of cases ranging from serious criminal matters to complex civil cases. The Council was impressed by the favorable reviews of Judge Kanne's state court work which we received from the lawyers who appeared before him. These comments indicated that Judge Kanne had an excellent reputation for honesty and independence and that he was hardworking, efficient, fair, and controlled his courtroom well. Reports from these lawyers also told us that Judge Kanne was intelligent and had an excellent knowledge of the law. A review of Indiana appellate court opinions reviewing his work as a trial court judge indicates that he was rarely reversed.

The comments from lawyers who have appeared before Judge Kanne since he became a federal district court judge are similar to the reactions we received to his performance as a state court judge. He as an excellent reputation for honesty, integrity, and fairness. He is known to control his courtroom efficiently and fairly. He is rated as hardworking and conscientious. While he is not known as legal scholar, his written work is competently crafted and he receives high marks from the lawyers who appear before him with respect to his understanding of complex legal issues and his ability to rule correctly on evidentiary matters.

The only area of performance that gives the Council some pause is Judge Kanne's writing. Some lawyers commented that it was not quite of the quality that they would like to see from a judge of the Seventh Circuit because, while workmanlike, Judge Kanne's writing does not display originality or unusual insight. The Council finds Judge Kanne's writing to be solid, but not outstanding. The Council, however, finds that Judge Kanne's extensive judicial experience and his outstanding performance as a trial court judge makes him qualified for the Seventh Circuit. The Council is particulary impressed with the breadth of Judge Kanne's judicial experience. The Council believes that Judge Kanne's extensive experience in the trial court will be of great benefit to the Seventh Circuit.

Very truly yours,

Thomas F. Geraghty

Thomas F. Geraghty
Chairman
Federal Judicial
Evaluation Commmittee

TFG:pv

BIOGRAPHY

JAMES H. ALESIA

Birth:	July 16, 1934	Chicago, Illinois
Legal Residence:	Illinois	
Marital Status:	Married	Kathryn P. Gibbons 2 children
Education:	1953 - 1956	Loyola University B.S. degree
	1956 - 1960	IIT/Chicago-Kent College of Law LL.B. degree
Bar:	1960	Illinois
	1970	Minnesota
Experience:	1960 - 1961	Law Offices of Antony Scariano Associate
	1961 - 1963	Pretzel, Stouffer, Nolan & Rooney Associate
	1963 - 1970	Chicago & North Western Transportation Company Attorney
	1970 - 1971	Rerat, Crill, Foley & Boursier Associate
	1971 - 1973	Assistant U. S. Attorney Northern District of Illinois
	1973	The Chessie System Trial Counsel
	1973 - 1980	U. S. Administrative Law Judge Dept. of Health & Human Services
	1980 - 1982	U.S. Administrative Law Judge U.S. Occupational Safety and Health Review Commission
	1982 - 1986	Reuben & Proctor Partner
	1986 - present	Isham, Lincoln & Beale Partner
Office:	19 South LaSalle Street Chicago, Illinois 60603 312 558-5243	
Home:		

To be U. S. District Judge for the Northern District of Illinois

---

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

   James H. Alesia

2. **Address: List current place of residence and office address(es).**

   19 South LaSalle Street, Chicago, Illinois (W)

3. **Date and place of birth.**

   July 16, 1934; Chicago, Illinois

4. **Marital status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married to Kathryn P. Gibbons on July 8, 1961 in St. Brendan Church, Chicago, Illinois. My spouse does not work outside of our home, although she is a former school teacher.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Loyola University, Chicago, Illinois
   Bachelor of Science degree - Political Science, 1953-1956; Class President; Vice President, Blue Key National Honor Fraternity; Completed the four year course in three years and received "honors" on the Political Science comprehensive examination covering the entire undergraduate study in my major field;

   IIT/Chicago-Kent College of Law, 1956-1960
   Bachelor of Law, converted to Juris Doctor. Phi Alpha Delta Fraternity. I worked as a Chicago Police Officer while a law student. I passed the Illinois Bar Examination on my first attempt and resigned from the Chicago Police Department. I also took two courses at John Marshall Law School while attending IIT/Chicago-Kent because of a conflict in my schedule.

   National Judicial College, University of Nevada, (Reno)
   Graduate (1976)
   Faculty Member (1979)
   Faculty Coordinator (1980)

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which your were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

   1957-1960
   Chicago Police Officer - Police officer while attending law school

   1960-1961
   Law Offices of Anthony Scariano [now Scariano, Kula & Ellch], 1450 Aberdeen Street, Chicago Heights. Anthony Scariano is now a Justice of the Appellate Court of Illinois.

   General practice of law

   1961-1963
   Pretzel, Stouffer, Nolan & Rooney [now Pretzel & Stouffer], One South Wacker Drive, Suite 2500, Chicago.

This is an insurance defense firm. Handled the motion call for the firm, tried subrogation and property damage lawsuits and was engaged in trial preparation and the taking of depositions in insurance defense cases.

1963-1970
Chicago & North Western Transportation Company, 165 North Canal Street, Chicago.

Hired as a trial attorney; subsequently promoted to Assistant General Attorney, General Attorney and Assistant General Counsel. Represented the Chicago & North Western Railroad in major litigation in the Federal and State Courts.

1970-1971
Rerat, Crill, Foley & Boursier [now Rerat Law Firm], Galaxy Building, Minneapolis, Minnesota.

Trial attorney for personal injury cases brought under the Federal Employers' Liability Act. Practiced in various Federal Courts and State Courts, but primarily in the Federal Court.

1971-1973
Assistant United States Attorney for the Northern District of Illinois, 219 South Dearborn St., Chicago.

Trial practice limited exclusively to the Federal Courts. Responsible for caseload involving immigration law, labor law, Federal Tort Claim Act, habeas corpus, criminal law, Food & Drug Act, housing law and civil tax law. Recipient of commendations from the Director of the Federal Bureau of Investigation and the Assistant Attorney General for the successful handling of criminal and civil cases. Rated "Outstanding" as an Assistant U.S. Attorney. Promoted to Deputy Chief of the Civil Division in 1973.

1973
Trial Counsel - The Chessie System, [local office in Chicago was closed in about 1975].

Responsible for the defense of all major litigation in Chicago for the Chesapeake & Ohio Railway Company, the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Chicago Terminal Railroad Company and the Chicago, South Shore and South Bend Railroad Company which are all part of the Chessie System. Practiced in Federal and State Courts. Resigned to become a United States Administrative Law Judge.

1973-1980
United States Administrative Law Judge
Department of Health & Human Services
Social Security Administration
230 South Dearborn Street, Chicago.

Heard cases and issued written decisions pursuant to the Administrative Procedure Act. Served as the Administrative Law Judge in Charge, from 1975-1976. My decisions were reviewable by the United States District Court.

1980-1982
United States Administrative Law Judge
United States Occupational Safety and Health Review Commission, 55 East Monroe Street, Chicago. [This office was closed in 1985].

Heard cases and issued written decisions pursuant to the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the Administrative Procedure Act. My decisions were reviewable by the United States Court of Appeals.

1982-1986
Reuben & Proctor, 19 South LaSalle Street, Chicago. Merged into Isham, Lincoln & Beale on 7-21-86; Remain a capital partner at the merged firm.

1986-Present
Isham, Lincoln & Beale, 19 South LaSalle Street, Chicago.

Engaged in all aspects of litigation in Federal and State Courts, including libel and slander, personal injury, tax, real estate, chancery, federal criminal defense and commercial litigation.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Blue Key National Honor Fraternity, [past Vice-President-Loyola University Chapter].
Who's Who in American Law, 1st edition and subsequent editions.
Moot Court Judge, IIT/Chicago-Kent College of Law (1966).
Trial Advocacy Judge, Loyola University School of Law (1977).
Trial Advocacy Judge, John Marshall Law School (1979).
Moot Court Judge, DePaul University School of Law (1980).
Moot Court Judge, Northwestern School of Law (1985).
"av" rating by Martindale-Hubbell Law Directory
Member of the Law Division Task Force of the Special Commission on the Administration of Justice in Cook County, 1985 to present.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Illinois State Bar Association
American Bar Association
Federal Bar Association
Justinian Legal Society
Celtic Legal Society
Blue Key National Honor Fraternity
Phi Alpha Delta Legal Fraternity
Elected to the National Board of Directors of the Association of Administrative Law Judges, five terms (1975-1980)

Elected Assembly Representative, Illinois State Bar Association (1978-1981); Re-elected (1981-1984)

Elected to the Executive Committee of the Conference of Administrative Law Judges Judicial Administration Division of the American Bar Association (1980-1982)

Charter Life Fellow, Illinois Bar Foundation

Traffic Court, WTTW, educational television, 1962. Appeared as both a prosecutor and defense counsel on two television programs.

Lecturer on administrative law at the Chicago Bar Association (Young Lawyers Journal, Chicago Bar Association, Vol. 5, No. 2, December, 1975)

Lecturer on disability cases during orientation course for law clerks of Administrative Law Judges (1975)

Member, American Bar Association - United States Civil Service Commission panel, which interviews prospective Administrative Law Judges (1976-1981)

Member, National Nominating Committee, Judicial Administration Division, Conference of Administrative Law Judges, American Bar Association, (1977-1979)

National Judicial College
Graduate (1976); faculty member (1979); faculty coordinator (1980).

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).**

Civic - Union League Club of Chicago.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.**

Supreme Court of Illinois, 1960
Supreme Court of Minnesota, 1970
Supreme Court of the United States, 1971
United States Court of Appeals for the Seventh Circuit, 1961
United States Court of Appeals for the Eighth Circuit, 1970
United States Court of Appeals for the Ninth Circuit, 1980
United States District Court for the Northern District of Illinois, 1960; trial bar, 1982;
United States District Court for the District of Minnesota, 1970
United States District Court for the District of South Dakota, 1971
United States District Court for the Northern District of Texas, 1979
United States District Court for the Eastern District of Wisconsin, 1980
United States District Court for the District of Hawaii, 1980
United States Tax Court, 1972

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

1) "The Administrative Procedure Act as an Independent Grant of Jurisdiction," 65 Illinois Bar Journal, P. 730 (July, 1977); reprinted in 12 The Justinian Law Journal, P. 15 (January, 1978) and by the National Judicial College (1979), (1980).

2) "Disability Under the Social Security Act," 66 Illinois Bar Journal, P. 444 (April, 1978); reprinted in 13 The Justinian Law Journal, No. 1, P. 33 (1979); by the National Judicial College (1979), (1980); and in 16 Law Notes, No. 2, P. 33, American Bar Association (Spring, 1980).

3) "Practice Before the United States Occupational Safety and Health Review Commission," 69 Illinois Bar Journal, P. 46 (September, 1980); reprinted in 86 Case & Comment, No. 2, P. 34 (March-April, 1981); reprinted in Barrister, Young Lawyers Division, American Bar Association, (Fall, 1981); reprinted in 18 Law Notes, American Bar Association, No. 1, P. 1, (Winter, 1982).

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent. August, 1986.

14. **Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

1973-1980
United States Administrative Law Judge
Department of Health & Human Services
Social Security Administration
(Appointive)

Heard cases and issued written decisions pursuant to the Administrative Procedure Act. Served as the Administrative Law Judge in Charge, from 1975-1976. My decisions were reviewable by the United States District Court.

1980-1982
United States Administrative Law Judge
United States Occupational Safety and Health Review Commission. (Appointive)

Heard cases and issued written decisions pursuant to the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the Administrative Procedure Act. My decisions were reviewable by the United States Court of Appeals.

15. **Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.**

Social Security cases are not reported. I did not retain copies of my decisions. Judge Francis J. O'Byrne, the judge in charge of my former office, has advised me that office copies of decisions are destroyed after two years.

I have obtained copies of some decisions from attorneys and former clerks. These decisions, however, are not necessarily the most significant cases.

I have enclosed copies of seven Social Security decisions. The names and Social Security numbers are redacted since all of the hearings were closed. Davis, however, became public record after the appeal.

Davis is significant and is reported as Davis v. Califano, 603 F.2d 618 (7th Cir. 1979). The Court quoted extensively from my decision.

I have also enclosed copies of Kastalon, Inc., United States Steel Corp. and Kropp Forge Co., which were written by me when I was an Administrative Law Judge with the Occupational Safety and Health Review Commission. My decision in Kropp Forge Co. became the final decision of the Occupational Safety and Health Review Commission, but was reversed in Kropp Forge Co. v. Secretary of Labor & OSHRC, 657 F.2d 119 (7th Cir. 1981).

On July 23, 1986, The Occupational Safety and Health Review Commission affirmed my decision in Kastalon. The case is reported at 12 BNA OSHC 1928 (1986).

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Chicago Police Officer 1957-1960 (appointive)
Assistant United States Attorney (N.D. Ill.) 1971-1973 (appointive)

17. **Legal Career:**

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

No

2. **whether you practiced alone, and if so, the addresses and dates;**

No

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

See my answer to Question 6.

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

1960-1961 - General practice with minimal trial work.

1961-1973 - Exclusively trial work.

1973-1982 - Federal Administrative Law Judge

1982-Present - Exclusively trial work.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

Chicago Tribune, Chicago Bears, Chicago Cubs, WGN Continental Broadcasting Company, Metropolitan Fair & Exposition Authority, National Broadcasting Company and various individual and corporate clients.

I have specialized exclusively in trial work in varied types of litigation, both civil and criminal, in the federal and state courts.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

From 1961 to 1973 before I became a United States Administrative Law Judge, I appeared in court almost on a daily basis. From October, 1973 to February, 1982, I was a United States Administrative Law Judge. From February, 1982 to the present, I appear in court usually several days a week depending upon circumstances.

2. **What percentage of these appearances was in:**

(a) **Federal Courts**

1961-1973 50%
1973-1982 Judge - 100%
1982-Present 60%

(b) **State Courts**

1961-1973 50%
1973-1982 0%
1982-Present 40%

(c) **Other Courts**

0%

3. **What percentage of your litigation was:**

(a) **Civil**

1961-1973 90%
1973-1982 100%
1982-Present 75%

(b) **Criminal**

1961-1973 10%
1973-1982 0%
1982-Present 25%

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

I have tried approximately 35-40 cases to verdict or judgment. I was usually either sole counsel or chief counsel.

5. **What percent of these trials was:**

   1) **Jury**

   2) **Non-Jury**

   1961-1973 - almost 100% jury [except for cases tried in minor courts].

   1973-1982 - Federal Administrative Law Judge.

   1982-Present - All of the cases I have tried have been non-jury cases.

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

    (a) the date of representation;
    (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
    (c) The individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

    1. Joe T. Williams v. United States, No. 71 C 893, United States District Court for the Northern District of Illinois.

       This case arose out of an alleged medical malpractice by the Veterans Administration Hospital where the plaintiff claimed that because of excessive dosages of streptomycin over an extended period of time he sustained total and permanent neurological injuries because of drug toxicity. The plaintiff sued under the Federal Tort Claims Act for $500,000. As an Assistant United States Attorney, I represented the defendant. This case involved extensive preparation and was tried on July 18, 19, 20 and 21, 1972 before former Judge Philip W. Tone, who was on the United States District Court at that time. Judge Tone held for the defendant. I did extensive pre-trial preparation, although former Assistant United States Attorney James K. Toohey assisted me at trial since this case was extremely complicated and involved numerous expert witnesses. The significance of this case was that the plaintiff had a neurological impairment and if he could have shown a causal connection between the drug and his impairment, he could have been awarded a substantial judgment. Judge Tone is a partner with Jenner & Block, One IBM Plaza, Chicago, tel. 222-9350 and Mr. Toohey is a partner with Ross & Hardies, 150 N. Michigan Ave., Chicago, tel. 558-1000. The plaintiff was represented by Mr. Harry B. Davidson, who is now deceased and by Sheldon S. Grauer, 1721 Roosevelt Rd., Broadview, Illinois, tel. 344-4401.

2. United States v. Peter Alexander Makres, No. 72 CR 326, United States District Court for the Northern District of Illinois.

The defendant had previously filed a petition for post-conviction relief under 28 U.S.C. § 2255 wherein he made certain allegations under oath. I also handled that case [Makres v. United States, 337 F. Supp. 1125 (N.D. Ill. 1972)]. Judge Will held that the plea of guilty was voluntarily entered by the defendant and referred the case to the United States Attorney for possible perjury prosecution. The criminal case was also assigned to me and I presented it to the Grand Jury. An indictment was returned and I prepared the indictment, attended the 2.04 conference and tried the case on June 27, 28 and 29, 1972 before a jury. The jury returned a verdict of guilty. This was a case of first impression under 18 U.S.C. § 1623. Former Judge Philip W. Tone heard the case. Mr. Edward J. Bradley, Jr., 29 South LaSalle Street, Chicago, tel. 372-5454, represented the defendant. I represented the Government.

3. United States v. International Longshoremen's Assn., AFL-CIO, Local 418 et al. 335 F. Supp. 501 (N.D. Ill. 1971); 40 LW 2276 [11-16-71]; 40 LW 2330 [12-7-71].

This case was a petition for an injunction under the Labor Management Act of 1947 (Taft-Hartley Act) 20 U.S.C. §178. The Government named the union and various grain companies as parties defendant and various states sought to intervene. A temporary restraining order was granted. The Government contended that if an eighty-day injunction was not granted, severe economic loss would occur in the country. The Assistant Secretary of Agriculture, President of the American Farm Bureau, and agricultural economists testified during the trial on October 21, 22, 25, 26 and 27, 1971. Judge Abraham L. Marovitz ruled against the Government and we took an emergency appeal to the United States Court of Appeals, which sustained Judge Marovitz. The case was reported to be the longest trial under the Taft-Hartley Act at that time.

Mr. Irving M. Friedman, of Katz, Friedman, Schur & Eagle, 7 South Dearborn Street, Chicago, tel. 263-6330, represented the union. Mr. Howard R. Barron, a partner with Jenner and Block, One IBM Plaza, Chicago, tel. 222-9350, represented the grain companies. Mr. John B. Simon, former Ass't. U.S. Attorney, and I represented the Government. Mr. Simon is now a partner with Jenner and Block.

4. Burton v. Burlington Northern, Inc., No. 5-70 Civ. 23, United States District Court for the District of Minnesota, 5th Division.

   This cause of action was filed under the Federal Employers' Liability Act, 45 U.S.C. §51 et seq. The plaintiff, age 61, sustained a tear to his medial meniscus while working for the defendant.

   The jury returned a verdict of $81,000 and the highest offer during trial was $25,000. This case was the highest reported verdict at that time for that injury under the FELA. The case was also the first six-person jury trial in the United States District Court in Minnesota.

   Judge Philip Neville, now deceased, heard the case on January 4, 5 and 6, 1971 in Duluth, Minnesota. Mr. Kurt W. Kroschel, BN Law Department, Burlington Building, 176 East 5th Street, St. Paul, Minnesota represented the defendant. I represented the plaintiff.

5. Mulloy v. Chicago North Western Railway Co., No. 66 C 2351, United States District Court for the Northern District of Illinois.

   This case was brought under the Federal Employers' Liability Act for serious injuries received by the plaintiff when he fell from a ladder while employed by the defendant railroad. This case was tried before a jury on February 21, 23 and 26, 1968. The plaintiff asked the jury for $85,000. The plaintiff's demand for settlement was $52,500. The railroad offered $25,000 to settle and the jury returned a verdict of $35,000.

   The case was tried before Judge Alexander J. Napoli, who is deceased. Mr. Robert J. Rafferty, who is deceased, represented the plaintiff. I represented the defendant.

6. Myers v. Chicago & North Western Railway Co., No. 58 C 428, United States District Court for the Northern District of Illinois.

   This case was a railroad crossing case brought for personal injuries sustained when the plaintiff, a postal worker, was struck by a train while driving a mail truck over a railroad crossing in Chicago. The difficulty in defending this case was that the railroad crossing gates were manually operated by a railroad employee until 10:00 p.m. This accident occurred in the late evening when the attendant was not on duty and the gates were left in an upright position in the dark.

   The plaintiff claimed a traumatic neurosis as a result of that accident. The plaintiff had been in various Veterans Administration Hospitals and claimed permanent and total disability and that he could not return to work.

This case was tried in early 1964 and the jury returned a verdict of not guilty. I represented the defendant.

The case was tried before Judge Bernard Decker for several days. The plaintiff was represented by Mr. Roland D. Cassata, a partner in the Wheaton office of Querrey, Harrow, Gulanick & Kennedy, 311 Naperville Road, Wheaton, Illinois, tel. 653-2600.

7. Metropolitan Fair & Exposition Authority v. Prophet Foods Co., a Division of Greyhound Food Management, Inc., Department of Revenue of State of Illinois, Department of Local Government Affairs of the State of Illinois, The Board of Appeals of Cook County, Thomas C. Hynes, Assessor of Cook County, Illinois and Richard M. Daley, States Attorney of Cook County, Illinois, No. 81 L 14933, Circuit Court of Cook County, Illinois.

The plaintiff filed a Declaratory Judgment action because of an attempt by the Illinois Department of Revenue to tax as a leasehold interest a contract entered into by the Authority, a tax-exempt municipal corporation, and Prophet Foods Company. The plaintiff contended that this contract was not a lease, but merely a license to provide essential food and beverage services at McCormick Place and the tax assessments of $500,000 against Prophet Food Company was, in effect, a tax on essential services licensed by a tax-exempt municipal corporation.

The case was tried on June 1, 1982 before Judge James C. Murray. I represented the plaintiff. Former Assistant Attorney General Arthur D. Kessler, now with Patrick Parisi & Associates, 20280 Governors Highway, Olympia Fields, Ill., tel. 481-2000, represented the Illinois Department of Revenue. Assistant States Attorney Lawrence B. Brodsky, 500 Daley Center, Chicago, tel. 443-4189, represented the County defendants. Calvin P. Sawyer and John Donovan Bixler of Winston & Strawn, One First National Plaza, Chicago, tel. 558-5752, represented Prophet Food Company.

Judge Murray, now an Illinois Appellate Court Justice, ruled on October 6, 1982 in my favor and held that the agreement was a license and not a lease, that a tax on a supplier is in effect an indirect tax on the MFEA, a tax-exempt municipal corporation, and that food and beverage service at McCormick Place is essential to the operation at McCormick Place. This decision was of great precedential value in the operation of McCormick Place.

8. Robert W. Billings & Associates, Inc., d/b/a TransAd Company v. Metropolitan Fair & Exposition Authority, et al., No. 83 CH 2020 Circuit Court of Cook County, Chancery Division, Chicago, Illinois.

Plaintiff filed a Complaint for Injunctive Relief which alleged that the MFEA had breached its exclusive right to sell advertising at McCormick Place, a convention center. Defendants alleged that the plaintiff breached the contract, that the contract was lawfully terminated and that the case should have been sued at law. Plaintiff filed an Amended Complaint for a Preliminary Mandatory Injunction and a Petition for a Preliminary Restraining Order.

After argument, the Petition for a Temporary Restraining Order was denied by Judge Albert S. Porter on March 16, 1983.

A motion for leave to file a motion to dismiss was filed by the defendants on March 28, 1983, but the judge reserved ruling on the motion.

Plaintiff filed a Response to the Affirmative Defenses raised by the Defendants. Argument was heard on March 28, 1983.

A motion for a second Temporary Restraining Order was heard on March 31, 1983. It was withdrawn after the case was set for an evidentiary hearing on April 4, 1983.

Three depositions were taken on April 1, 1983. An additional deposition was taken on April 9, 1983.

An evidentiary hearing was held on April 4, 11, and 13, 1983 on the affirmative defenses filed by the defendants.

Judge Porter denied a Preliminary Injunction on September 14, 1983. The case was subsequently transferred to the Law Division of the Circuit Court of Cook County for a jury trial.

Plaintiff was represented by William Cook, 1134 West Washington, Chicago, Illinois, tel. 829-2292. I represented the parties defendant.

9. Professional Exposition Management Company, Inc., Plaintiff v. Cahners Exposition Group Co., Inc., Clapp & Poliak, a Cahners Exposition Group, Robert Krakoff, Jennifer Patchell, Terence V. Brooks, L. K. Shinneman, Software Response and Banner & Greif, Ltd., Defendants, No. CH KA 84-0228, Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois; No. 84 CH 4981, Circuit Court of Cook County, Illinois, Chancery Division.

This case was a motion for a Temporary Restraining Order and a Complaint for Injunctive Relief brought by the plaintiff, a promoter of trade shows.

The principal defendant Cahners was also a trade show promoter.

Plaintiff claimed that the defendant Cahners selected a name deceptively similar to the show promoted by the plaintiff, illegally obtained lists of contacts and mailing lists, and selected the same subject matter for its show that the plaintiff selected.

Plaintiff requested a Preliminary and Permanent Injunction and $1,000,000 damages on each of three counts in the complaint.

I represented all of the defendants except Brooks, Shinneman, and Software Response who did not appear.

I appeared before Judge Paul W. Schnake on May 31, 1984 in the Circuit Court in Kane County to present a motion to transfer to Cook County because of improper venue and argued against the Motion for a Temporary Restraining Order. Judge Schnake took our motion to transfer under advisement. After extensive argument, the judge denied the motion for a Temporary Restraining Order.

On June 1, 1984, Judge Schnake granted our motion to transfer and transferred the case from Kane County to Cook County. Judge Schnake is now a Justice of the Illinois Appellate Court.

This case was assigned to Judge Anthony Scotillo of the Chancery Division of the Circuit Court of Cook County. A preliminary injunction evidentiary hearing was held on June 11, 12, and 13, 1984. Judge Scotillo granted our motion for a directed finding on June 13, 1984 and denied the Motion for a Preliminary Injunction.

Plaintiff was represented by Wendell W. Clancy and Mary Ellen Hulce of the law firm of Clancy, McGuirk and Hulce of St. Charles, Illinois. Mr. Clancy's address is 7 South Second Avenue, St. Charles, Illinois, tel. 584-7666. Our local counsel was Lambert M. Ochsenschlager and Wayne F. Weiler of Reid, Ochsenschlager, Murphy & Hupp of Aurora, Illinois, tel. 892-8771, before the case was transferred to Cook County.

10. Production Workers Union, Local 707, et al., Plaintiffs, v. Metropolitan Fair & Exposition Authority, Defendant and Local 25, Service Employees International Union, AFL-CIO, Intervenor, Circuit Court of Cook County, Chancery Division, No. 84 CH 2558; Appellate Court of Illinois, First Judicial District, No. 84-740 and 84-1302 (consolidated).

This case involved a motion for a Temporary Restraining Order and a Preliminary Injunction to force the defendant, a public body, to hold an election to determine which union would represent the janitorial employees at the McCormick Place Convention Center. Local 25, the incumbent union, filed a motion to intervene which was granted.

Defendant defended on the basis that under Illinois common law, the court has no authority to order a public body to hold an election or negotiate with its employees and that the plaintiffs did not prove the four essential elements for injunctive relief.

A hearing was held on March 22 and 23, 1984 before Judge David J. Shields. At the conclusion of the hearing, Judge Shields ordered the defendant to conduct an election and denied a stay of his order.

Defendant filed an emergency motion for a dissolution of the preliminary injunction or for a stay of the injunction pending appeal before the Appellate Court of Illinois.

The Appellate Court did not act on an emergency basis and the normal briefing schedule was used to file expanded briefs.

On July 31, 1985, in a unanimous decision under Supreme Court Rule 23, the Appellate Court reversed the trial court and ruled on our behalf.

Donald W. Cohen, of Asher, Pavalon, Gittler & Greenfield, 2 North LaSalle Street, Chicago, tel. 263-1500, represented Local 25. Michael Conway, of Hopkins & Sutter, 3 First National Plaza, Chicago, 558-6742, represented the plaintiff. My partner, Roger Brice and I represented the Metropolitan Fair & Exposition Authority.

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)**

I have also been involved in various proceedings in the United States District Court which were not trials, but involved varied legal matters.

I have successfully represented various news media in cases in the United States District Court wherein the media sought to obtain copies of FBI undercover tapes and/or transcripts after they were admitted into evidence. These cases were:

a) United States v. Infelice, et al., 82 CR 827 - Judge Charles P. Kocoras, January 26, 27, 1984. I represented the Chicago Tribune.

b) United States v. Wolfson, 83 CR 976 - former Judge Thomas R. McMillen, May 29, 1984; July 3, 1984. I represented the National Broadcasting Company. The case is reported at 10 Med. L. Rptr. 1828; 10 Med. L. Rptr. 2047.

c) United States v. Murphy, 83 CR 979 - Judge Charles P. Kocoras, March 30, 1984, April 4, 1984. I represented NBC.

I represented Columbia Pictures in the United States District Court wherein the plaintiff attempted to enjoin the television program "T.J. Hooker" because the plaintiff alleged that the defendants 1) tortiously appropriated his name, 2) violated his privacy and 3) violated the Federal Trademark statute and 4) the Deceptive Practices Act. Judge Kocoras ruled in our behalf. The case is reported as Hooker v. Columbia Pictures Industries, et al., 551 F. Supp. 1060 (N.D. Ill. 1982). I was lead counsel in court.

My partner, Don Reuben, and I successfully defended a Civil RICO case which was affirmed on appeal, Carter et al. v. Berger, 777 F. 2d 1173 (7th Cir. 1985).

I also represented WGN Continental Broadcasting Co. in a case of first impression involving copyright law. Production Contractors, Inc. v. WGN Continental Broadcasting Co., 622 F. Supp. 1500, (N.D. Ill. 1985). I was lead counsel in Court.

I have also handled other federal matters which were dismissed on motion, but were reported: Brindle v. C&O Ry. Co., 357 F. Supp. 1116 (N.D. Ill. 1973) [§1404(a) Motion]; Adame v. Immigration & Naturalization Service, 349 F. Supp. 313 (N.D. Ill. 1972) [immigration case]; Cosentino v. U.S., 333 F. Supp. 539 (N.D. Ill. 1971) [§2255 petition]; Tritsis v. Backer, 355 F. Supp. 225 (N.D. Ill. 1973) [civil rights case]; Bitang v. Regional Director, 351 F. Supp. 1342 (N.D. Ill. 1972) [immigration case] and Chi-Wai Lui v. Pilliod, 358 F. Supp. 542 (N.D. Ill. 1973) [immigration case].

I have also been involved in cases in the United States District Court which either resulted in a negotiated plea or a settlement.

The criminal cases were United States v. Board of Trade Clearing Corp., 84 CR 689 (N.D. Ill.) Don Reuben was the lead counsel and I was the associate counsel; United States v. Sharkey, 85 CR 74 (N.D. Ill.), I was sole counsel.

Erie-Lackawanna Railroad Co. v. Chicago & North Western Ry. Co., 67 C 2150 (N.D. Ill.) was a suit for over $900,000 in property damage because of a derailment. I represented the defendant. The case was settled for $150,000 in 1968 after extensive discovery.

Miller v. Chicago North Western Ry. Co., 64 C 1995 (N.D. Ill.), was a FELA case wherein the plaintiff lost his leg in a railroad accident and sued for $250,000. I settled the case in 1966 for $92,652.00.

Magnavox v. Bally Midway, 83 C 2357 (N.D. Ill.) and Midway v. North American Phillips, 81 C 6434 (N.D. Ill.) were cases involving the Pac Man patent and copyright. We represented the plaintiff in Magnavox (patent case) and the defendant in Midway (copyright). Don Reuben was lead counsel and I was associate counsel. We realized a seven figure settlement for our client.

Kelly v. Arriconi and Norfolk & Western Railroad Co., 84 C 338 (N.D. Ill.) was a personal injury case, wherein I represented the plaintiffs and brought suit in the federal court under diversity of citizenship. I was sole counsel.

Cantrell v. American Broadcasting Co., 80 C 6716 (N.D. Ill.) was a libel case. Don Reuben, William Campbell and I were counsel for the defendant.

Greene, et al. v. Piszczek, et al., 85 C 10399 (N.D. Ill.) was a breach of contract case wherein I was lead counsel representing the plaintiff in the federal court. The case was settled for $325,000.00 on the day this case was set for trial in December, 1986.

In the state courts, Don Reuben and I also handled a libel case, Owen v. Carr, et al., wherein we successfully represented the National Law Journal. The dismissal was affirmed on appeal by the Illinois Appellate Court and reported at 134 Ill. App. 3d 855, 478 N.E. 2d 658 (1985), and again affirmed by the Supreme Court of Illinois and reported at 113 Ill. 2d 273, 497 N.E. 2d 1145 (1986).

I was lead counsel in a successful appeal which is a leading case on minor trespassers in Illinois. Sydenstricker v. Chicago North Western Railway Co., 107 Ill. App. 2d 427; 247 N.E. 2d 15 (1969).

I was lead counsel in a successful appeal of a criminal case. People v. Delafosse, 36 Ill. 2d 327; 223 N.E. 2d 125 (1967).

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.**

   None.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.**

   I will follow the Judicial Canon of Ethics.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   No.

4. **Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

   No.

5. **If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?**

   a) I will receive a refund of my capital contribution upon my resignation from the firm.

   b) I will either receive a refund from the Reuben & Proctor Retirement Fund under HR-10 or arrange for a rollover into my IRA, dependent upon advice from my tax attorney;

c) I will either receive a refund from the 401(k) plan or arrange for a rollover into my IRA, dependent upon advice from my tax attorney.

d) I will waive any further compensation from the firm for work done on pending litigation.

These steps will implemented prior to going on the bench. I anticipate a maximum period of two weeks after my confirmation to completely sever all ties to Isham, Lincoln & Beale.

6. **Please complete the attached financial net worth statement in detail. (Add schedules as called for.)**

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	207,000	00	
U.S. Government securities—add schedule	4,600	00	
Listed securities—add schedule	75,300	00	
Unlisted securities—add schedule	None		
Accounts and notes receivable:			
Due from relatives and friends	None		
Due from others	None		
Doubtful	None		
Real estate owned—add schedule	150,000	00	
Real estate mortgages receivable	None		
Autos and other personal property	20,000	00	
Cash value—life insurance	3,721	00	
Other assets—itemize:			
ISHAM, LINCOLN & BEALE Capital Account	34,688	11	
Reuben & Proctor Retirement (HR-10)	22,708	67	
Balcon/Amer. Exp. '83	10,000	00	
Isham, Lincoln & Beale 401(k) Acct.	9,000	00	
Total assets	537,017	78	

LIABILITIES			
Notes payable to banks—secured	None		
Notes payable to banks—unsecured	None		
Notes payable to relatives	None		
Notes payable to others	None		
Accounts and bills due	None		
Unpaid income tax	None		
Other unpaid tax and interest	None		
Real estate mortgages payable—add schedule	8,670	16	
Chattel mortgages and other liens payable	None		
Other debts—itemize:	None		
Total liabilities	8,670	16	
Net worth	528,347	62	
Total liabilities and net worth	537,017	78	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	None		
On leases or contracts	None		
Legal Claims	None		
Provision for Federal Income Tax	None		
Other special debt	None		

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	None		
Are you defendant in any suits or legal actions?	None		
Have you ever taken bankruptcy?	None		

Confidential Financial Statement
Net Worth
Schedules

ASSETS

U.S. Government Securities - (face value)	Series EE Bonds (JT)	$ 3,200.00
	Series EE Bonds (Son Brian)	700.00
	Series EE Bonds (Son Daniel)	700.00
		$ 4,600.00

Listed Securities

CSX	(JT) 1746 shares	$51,000.00	(approx.)
Skyline, Inc.	(JHA) 150 shares	2,200.00	(approx.)
CSX	(Brian) 300 shares	8,400.00	(approx.)
ITT	(Brian) 50 shares	2,650.00	(approx.)
CSX	(Daniel) 300 shares	8,400.00	(approx.)
ITT	(Daniel) 50 shares	2,650.00	(approx.)
		$75,300.00	(approx.)

Real Estate Owned

Residence at 1025 South Lincoln Ave., Park Ridge, Illinois, approximate fair market value $150,000; purchased in 1971 for $49,900.

LIABILITIES

The mortgage on my residence is $8,670.16 with Citicorp.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

> The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:
>
> a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;
>
> b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
>
> c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;
>
> d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
>
> e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Our government is a government of separation of powers of the executive, legislative and judicial branches of government. It is designed as a government of checks and balances.

I view the role of the judiciary as limited to the interpretation of the law.

2. **What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.**

I represented Harold Delafosse, an indigent black prisoner, on appeal pro bono. He was convicted of armed robbery and sentenced to 10-15 years in prison.

The Supreme Court of Illinois reversed and remanded his conviction. The State did not re-try him and he was released from prison.

The case is reported as People v. Delafosse, 36 Ill. 2d 327; 223 N.E. 2d 125 (1967).

Rec'd. 2/6/87
RG.

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101

Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

BOARD OF GOVERNORS
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Diane Livingston
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Chicago, IL 60611
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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JAMES H. ALESIA
United States District Court
Northern District of Illinois

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of James H. Alesia for appointment as Judge of the United States District Court for the Northern District of Illinois.

Our Committee is unanimously of the opinion that Mr. Alesia is "Qualified" for this appointment.

Sincerely,

Robert B. Fiske
ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

JOSEPH P. STADTMUELLER

Birth:	January 28, 1942	Oshkosh, Wisconsin
Legal Residence:	Wisconsin	
Marital Status:	Married	Mary Ellen Brady 2 children
Education:	1960 - 1962	University of Wisconsin
	1962 - 1964	Marquette University B.S. degree
	1964 - 1967	Marquette University Law School J.D. degree
	1967 - 1968	Marquette University Graduate School in Business Administration
Bar:	1967	Wisconsin
Experience:	1968 - 1969	Kluwin, Dunphy, Hankin & Hayes Associate
	1969 - 1975	Assistant U. S. Attorney Eastern District of Wisconsin
	1976	Stepke, Kossow, Trebon & Stadtmueller, partner
	1977 - 1981	Assistant U. S. Attorney, 1977 Deputy United States Attorney (1978 - 1981) Eastern District of Wisconsin
	1981 - present	United States Attorney Eastern District of Wisconsin
Office:	330 Federal Building 517 East Wisconsin Avenue Milwaukee, Wisconsin 53202 414 291-1700	
Home:		

To be United States District Judge for the Eastern District of Wisconsin

---

[illegible] TEE
[illegible] 2 [illegible] 12 15

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (Public)

1. Q. Full name (include any former names used).

   A. Joseph Peter Stadtmueller

2. Q. Address: List current place of residence and office address(es).

Office Address- 330 Federal Building
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

3. Q. Date and place of birth.

3. January 28, 1942, Oshkosh, Wisconsin

4. Q. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married - September 5, 1970
Wife's maiden name - Mary Ellen (Brady)
Children - Jeremy Joseph, age 11
- Sarah Katherine, age 10
Spouse's occupation - Physical Therapist (part time)
Spouse's employer - St. Joseph's Hospital
5000 West Chambers Street
Milwaukee, Wisconsin 53210

5. Q. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

A. University of Wisconsin, Oshkosh - September 1960-June 1962
Transferred to Marquette University College of Business Administration
Marquette University, College of Business Administration
September 1962-June 1964
Degree: Bachelor of Science in Business Administration
June 7, 1964
Major - Accounting
Minor - Economics
Marquette University Law School - September 1964-June 1967
Degree, Juris Doctor, June 4, 1967
Marquette University Graduate School in Business Administration - September 1967-June 1968
Completed 14 credit hours of graduate study in business administration
Left in good standing to enter private practice of law

6. Q. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

A. September 1966-June 1967 - House Advisor, Walter Schroeder Hall, Marquette University, Milwaukee, 53233
September 1967-June 1968 - Assistant Head Resident, Walter Schroeder Hall, Marquette University, Milwaukee, WI 53233
February 1968-May 1968 - Marquette University Law School, Milwaukee, WI 53233
June 1968-December 1969 - Kluwin, Dunphy, Hankin and McNulty, Attorneys at Law, 510 East Wisconsin Avenue, Milwaukee, WI 53202
December 1969-December 1975 - U.S. Department of Justice, Washington, D.C. 20530
December 1975-December 1976 - Stepke, Kossow, Trebon & Stadtmueller, Attorneys at Law, 633 East Mason Street, Milwaukee, WI 53202
January 1977-Present - U.S. Department of Justice, Washington, D.C. 20530

7. Q. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

A. No

8. Q. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

A. College

Dean's List, senior year
Beta Alpha Psi, National Honorary Accounting Fraternity

Law School

Receipient of the "Outstanding Junior of the Year Award," presented by Delta Theta Phi, National Law Fraternity
Dean's Award for Outstanding and Meritorious Service to Marquette University Law School, 1968

Professional

Elected to membership in The American Law Institute by the Council of The American Law Institute, October 1983

Who's Who in America, 1984-

Who's Who in American Law, 1985-

Special Achievement Award together with a $600 cash award for outstanding work in conjunction with a successful Medicaid fraud prosecution, presented by Attorney General Benjamin Civiletti, July 31, 1980

Recipient of a special commendation award from the Wisconsin Supreme Court, Board of Attorneys Professional Responsibility for six years of service to the Milwaukee County District II Grievance Committee, which included two years as its Chairman, March 1986

Special Commendation Award for outstanding work as an Assistant United States Attorney, presented by Attorney General William Saxbe, December 1974

Presented with a Special Award of Meritorious Service to the State Bar of Wisconsin for service to the Board of Governors Executive Committee and various committees, June 1983

Following a formal nomination process I was selected by the United States Army as a governmental representative to attend and participate in a week-long National Security Seminar conducted at the United States Army War College at Carlisle Barracks, Pennsylvania in June 1985.

Following a formal nomination process I was selected by the Department of Justice as a representative of the United States Attorneys to attend and participate in a week-long Congressional Briefing Conference on the workings of the Congress which was sponsored by the Governmental Affairs Institute and held in Washington, D.C. in April 1983.

Special letter of commendation from Clarence M. Kelly, Director of the FBI, for work on criminal prosecutions, March 1975

9. Q. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

A. Professional affiliations:
    American Bar Association, 1968-
        Criminal Justice and Litigation Sections
    Milwaukee Young Lawyers Association, 1968-1979
    Seventh Circuit Bar Association, 1973-
    State Bar of Wisconsin, 1967-
    The American Law Institute, 1983-

    Martindale Hubbell - "AV" Rated

Service to the legal profession:
- American Bar Association
  - Criminal Justice Section
    - Grand Jury Committee, 1985-
      - Committee Vice-Chairman, 1986-87
    - Future of Criminal Justice Committee, 1983-85
    - White Collar Crime Tax Subcommittee, 1982-84
    - Specialization Committee, 1975-82
    - Membership Committee, 1977-78

Member, Committee on Federal Criminal Jury Instructions of the Seventh Circuit, 1984-

State Bar of Wisconsin
- Elected to a two-year term as a member of the Board of Governors, May 1979
- Reelected to a second two-year term, May 1981
- Elected to a one-year term as a member of the Board of Governors Executive Committee, May 1982
- Appointed to a three-year term as a member of the Milwaukee County Board of Attorneys Professional Responsibility Committee (Grievance Committee), December 1979
  - Reappointed to a second three-year term, December 1982
  - Appointed Chairman of the Milwaukee County Grievance Committee for a one-year term, effective January 1984
  - Reappointed for a second one-year term, effective January 1985
- Chairman, Amicus Brief Policy Committee, 1982-83
- Member, Insanity Defense Committee, 1982-87
- Board Liaison, Code of Professional Responsibility Committee, 1982-83
- Board Liaison, Environmental Law Committee, 1980-82
- Member, State Bar Court Liaison Committee, 1983-84
- Member, Liaison Committee - State Bar Board of Governors and Board of Attorneys Professional Responsibility, 1984-85
- Member, Local Court Rules Committee, Eastern District of Wisconsin, 1982-
- Milwaukee Young Lawyer's Association
  - Elected to four terms as member of the Executive Board, 1974-1978
  - Elected Secretary, 1977-1978
  - Numerous committee assignments, 1968-1978
- Elected to a three-year term as a member of the MBA/MYLA Judicial Selection Committee, 1976-1979

Seventh Circuit Bar Association
- Member, Criminal Law and Procedure Committee, 1984-85
- Co-Chairman, Meetings Arrangements - Wisconsin, 1986

Instructor, The Attorney General's Advocacy Institute, Washington, D.C., 1975-

The Attorney General's Advisory Committee of United States Attorneys
- Chairman, Tax Subcommittee, 1981-1984
- Member, Court Rules and Legislation Subcommittee, 1983-1985
- Member, Budget Subcommittee, 1985

Chairman, Law Enforcement Coordinating Committee, Eastern District of Wisconsin, 1981-

10. Q. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civil, educational "public interest" law, etc.).

A. State Bar of Wisconsin

American Bar Association

Other Memberships:

Board of Directors, Marquette University Law Alumni Association, 1985-
Junior League of Greater Milwaukee Citizens Advisory Board, 1986-
St. Monica's Catholic Church
The University Club of Milwaukee, 1976-
Whitefish Bay Building Board, 1985-
Whitefish Bay Silver Spring Renovation Study Committee, 1986-
Who's Who in America, 1984-
Who's Who in American Law, 1985-

11. Q. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

A. State of Wisconsin, June 5, 1967

U.S. District Court, Eastern District of Wisconsin, June 6, 1967

U.S. Court of Appeals for the Seventh Circuit, April 22, 1970

U.S. Supreme Court, August 8, 1980

12. Q. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

A. None

13. Q. Health: What is the present state of your health? List the date of your last physical examination.

Excellent, Date of Physical Examination - October 21, 1986
Physican, Paul LaBissioniere, M.D.

14. Q. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

A. None

15. Q. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

A. Not Applicable

16. Q. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

A. Appointed Positions:
Assistant United States Attorney, Eastern District of Wisconsin, December 1969-November 1974
First Assistant United States Attorney, Eastern District of Wisconsin, November 1974-December 1975
Assistant United States Attorney, Eastern District of Wisconsin, January 1977-October 1978
Deputy United States Attorney, Eastern District of Wisconsin, October 1978-February 1981
United States Attorney (court-appointed), Eastern District of Wisconsin, February 1981-December 1981
United States Attorney (presidentially appointed), Eastern District of Wisconsin, December 1981, reappointed June 1986

Elected Positions:
None

17. Q. Legal Career:

a. Describe chronologically your law practice and experience after your graduation from law school, including:

1. whether you served as clerk to a judge and, if so, the name of the judge, the court, and the dates of the period you were a clerk.

2. whether you practiced alone and, if so, the addresses and the dates.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

A. Following law school graduation and one year in graduate school in business administration, I began my career in the private practice of law in June 1968 when I became employed as an associate with the Milwaukee law firm of Kluwin, Dunphy, Hankin & Hayes, now known as Kluwin, Dunphy & Hankin, with offices at 788 North Jefferson Street, Milwaukee, Wisconsin. As one of three associates I was assigned all types of litigation-related work by Mr. John A. Kluwin, which included court trials related to the defense and prosecution of property damage subrogation cases. In addition, I assisted three of the firm's partners in completing legal research, drafting pleadings, taking discovery depositions, pretrial motion practice, preparation of trial and appellate briefs, as well as participation in civil jury trials with a senior member of the firm. With few exceptions my work experience at the Kluwin firm may be best described as defending litigation pending in the state and federal courts involving casualty losses, personal injuries and property damage stemming from general negligence, medical malpractice and products liability.

I resigned my position with the Kluwin firm in December 1969 upon receiving my appointment as an Assistant United States Attorney in the Office of the United States Attorney, Eastern District of Wisconsin.

During my tenure as an Assistant U.S. Attorney, and subsequently First Assistant, I was assigned and responsible for all aspects of civil litigation and federal criminal prosecutions, including preparation of complaints and search warrants, grand jury proceedings, indictments, pretrial motions, court and jury trials before the magistrate and district court as well as appeals to the Seventh Circuit Court of Appeals.

Representative criminal cases prosecuted include altered coins, assault, auto theft rings, bank robbery, bank fraud, bankruptcy fraud, counterfeiting, customs violations, embezzlement, explosives, bomb threats, extortion, false statements, firearms violations, fish and wildlife violations, forgery, gambling, interstate transportation of stolen property, mail fraud, narcotics including heroin, cocaine, marijuana and LSD, postal theft, theft from interstate shipments as well as criminal violations of the Internal Revenue Code.

Representative civil litigation handled includes bankruptcy claims and litigation, mortgage and tax lien foreclosures, IRS summons enforcement proceedings, contract matters and all types of cases arising under the Administrative Procedure, Tort Claims and Social Security Acts.

During the period November 1974 to December 1975, while serving as First Assistant U.S. Attorney, I was responsible for the supervision of all pending civil litigation in the office as well as day-to-day office administration, in addition to handling assigned civil and criminal cases.

I left the United States Attorney's Office for a period of one year in 1976 to become associated in a partnership with Russell R. Stepke, Lawrence A. Trebon and Julian R. Kossow in the private practice of law, with offices at 633 East Mason Street, Milwaukee. The firm, which also employed three associates, concentrated its practice in the banking, business, corporate and real estate areas. My principal responsibility was to handle civil litigation in the state and federal courts. In addition, I had responsibilities relating to office administration including the computerization of attorney timekeeping, client billings and client file information. Although my earnings were significantly higher than those provided in government service, in the fall of 1976 I simply was not finding myself involved in litigation and appearing in court as much as I would have liked. At the same time, I was approached about rejoining the United States Attorney's Office, which I did in January 1977 upon being reappointed as an Assistant U.S. Attorney. I resumed the basic caseload of an Assistant U.S. Attorney, which included some of the more sophisticated criminal and civil cases being handled by the United States Attorney's Office at that time, including a significant ongoing Medicare/Medicaid fraud investigation in which I supervised an assistant Milwaukee County district attorney as well as an assistant state attorney general, both of whom served as Special Assistant U.S. Attorneys to assist in the investigation and subsequent prosecution of the case.

In October 1978, I was promoted to the position of Deputy U.S. Attorney and, at the same time, assumed oversight responsibility for the civil litigation assignments of fourteen Assistant U.S.

Attorneys as well as all appeals to the Seventh Circuit Court of Appeals together with most substantive administrative matters between our office and the Department of Justice.

In February 1981, I was appointed United States Attorney for the Eastern District of Wisconsin, pursuant to 28 U.S.C. § 546, by Chief United States District Judge John W. Reynolds until the position was filled by Presidential appointment.

In June 1981, I was recommended for Presidential appointment as United States Attorney for the Eastern District of Wisconsin by Senator Robert W. Kasten, Jr. from a list of five candidates submitted by a fifteen-member Merit Selection Commission. I was formally nominated for the four-year appointment in November 1981 and, following Senate confirmation, received my appointment effective December 3, 1981. Following the reappointment confirmation process, I was appointed to a second term effective June 9, 1986.

In addition to carrying my own caseload, I am responsible for the overall management and operation of the United States Attorney's Office and its authorized staff, which includes eighteen Assistant U.S. Attorneys and twenty support staff personnel together with several part-time student positions. In addition to supporting the policies of the President and the Attorney General as they may relate to matters affecting the interests of the United States and the United States Attorney's Office, some specific areas of the United States Attorney's management responsibility include:

(1) the exercise of leadership within the office and acceptance and carrying out the direction of the Attorney General;

(2) maintaining relationships with client agencies, state and local law enforcement agencies, the courts, and the public served by the office;

(3) budgeting of funds and personnel;

(4) hiring and promotion of employee personnel;

(5) review and approval of all settlements, including monetary damages, in civil litigation;

(6) review of prosecution memorandums prepared by Assistant U.S. Attorneys and approval of all criminal matters presented to the grand jury for indictment as well as dispositions short of trial;

(7) administrative and statistical reporting to the Justice Department, including the Executive Office for United States Attorneys;

(8) coordinating matters and cases which may involve multiple government agencies as well as United States Attorney's Offices in other districts; and

(9) Chairman, Eastern District of Wisconsin Law Enforcement Coordinating Committee.

b. 1. What has been the general character of your law practice, dividing it into periods with dates, if its character has changed over the years?

The general character of my practice has been and continues to be in the field of civil and criminal litigation, principally in the federal courts.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Representative clients in private practice included automobile dealerships, contractors, financial institutions, insurance agents, insurance carriers, real estate developers, small businesses, including distributors, retail and manufacturing concerns and stockholders.

Representative clients in governmental practice include Bureau of Alcohol, Tobacco and Firearms, Bureau of Prisons, Department of Agriculture, Department of the Air Force, Department of the Army, Department of Commerce, Department of Education, Department of Health and Human Services, Department of Housing & Urban Development, Department of the Interior, Department of Labor, Department of the Navy, Department of Transportation, Drug Enforcement Administration, Environmental Protection Agency, Farmers Home Administration, Federal Aviation Administration, Federal Bureau of Investigation, Federal Highway Administration, Federal Housing Administration, Federal Judiciary, Federal Trade Commission, Fish & Wildlife Service, Food and Drug Administration, General Services Administration, Immigration & Naturalization Service, Interstate Commerce Commission, Internal Revenue Service, Office of Management and Budget, Office of Personnel Management, Postal Inspection Service, Secret Service, Small Business Administration, Social Security Administration, State Department, U.S. Customs Service, U.S. Forest Service, U.S. Postal Service, and Veterans Administration.

Areas of Specialization - civil and criminal litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Other than the latter half of 1976, I have consistently appeared in court on a regular basis in connection with both civil and criminal cases at the trial and appellate court level.

In addition to numerous criminal trials, I have tried a number of civil cases including actions for personal injuries, breach of contract, employment discrimination, conversion, forfeiture, medical malpractice, as well as a quiet title action involving real property.

In addition, my appellate experience in the United States Attorney's Office includes the preparation of written briefs and/or presentation of oral argument in over twenty-five civil and criminal cases which were appealed to the Seventh Circuit Court of Appeals.

2. What percentage of these appearances was in:

a. federal courts;
b. state courts of record;
c. other courts.

Prior to joining the United States Attorney's Office in 1969, all of my litigation experience was civil in nature, with 10% of my appearances in federal court, 85% in state court, and 5% in other courts. In 1976, all of my litigation was civil in nature, 30% of which was in the federal courts, 65% in state courts, and 5% in other courts. During my tenure in the United States Attorney's Office, 95% of my appearances have been in federal court and 5% in the state court.

3. What percentage of your litigation was:

   a. civil;
   b. criminal.

   a. 30%-40%
   b. 60%-70%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   30 cases as sole counsel
   5 cases as chief counsel
   20 cases as associate counsel

5. What percentage of these trials was:

   a. jury;
   b. non-jury.

A. a. 2/3
   b. 1/3

18. Q. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

A. United States v. Charles T. Pieper

Criminal Case No. 86-Cr-98, E.D. Wisconsin

In August, 1986, Charles T. Pieper, a Milwaukee area business executive and former Chairman of Teamsters Local 344 Drivers Pension Trust Fund, was charged by indictment with one count of conspiracy, twenty-one counts of solicitation and receipt of kickbacks, three counts of filing false and fraudulent federal income tax returns and one count of engaging in a pattern of racketeering activity (RICO). These charges stemmed from Pieper's conduct during the period July, 1981 through July, 1983, during which he and a bank loan officer split kickbacks amounting to three percent on more than ten million dollars of Teamster Pension Trust Fund loans which were administered by the bank officer's employer, the M&I Bank of Milwaukee.

The case was tried over a fourteen day period, commencing on January 26, 1987 before U.S. District Judge Thomas J. Curran and a jury. At the conclusion of trial, Pieper was found guilty of conspiracy, eleven of twenty-one substantive counts, three tax-related counts and RICO. In addition, in a special verdict the jury directed that Pieper forfeit to the United States approximately fifty thousand dollars in proceeds which he obtained as a result of his racketeering activity. Pieper has not yet been sentenced.

This case was significant in that it was the product of a comprehensive joint grand jury investigation by the FBI, Department of Labor and the Internal Revenue Service as well as the U.S. Attorney's Office. The thrust of the investigation was designed to ferret out criminal conduct and focused on payoffs and kickbacks to union officials. As a result, the case received considerable media and public attention.

My participation in the prosecution of this case included oversight responsibility for the grand jury investigation, review of the prosecution memorandum prior to submission of the case to the grand jury for indictment, preparation of the case for trial including interviewing witnesses, preparation of exhibits and jury instructions as well as the conduct of the trial itself. Assistant U.S. Attorney Stephen J. Liccione handled all aspects of the investigation and served as my co-counsel in all aspects of trial preparation as well as in the trial itself.

Defendant was represented by:

William M. Coffey, Esq.
Coffey, Coffey & Geraghty
3127 West Wisconsin Avenue
Milwaukee, Wisconsin 53208
Telephone 414-344-5700

Other government counsel:

Stephen J. Liccione
Assistant U.S. Attorney
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53208
Telephone 414-291-1700

United States v. Samuel Vretta

Criminal Case No. 84-Cr-14, E.D. Wisconsin

In January 1984 defendant Samuel Vretta was charged by indictment with the September 20, 1983 abduction and kidnapping of Allen H. Hauser, an Elm Grove, Wisconsin inventor, whose body was found two days later along a rural road in Bedford County, Tennessee. On the day of the elder Hauser's abduction his son Mark was found strangled in the family room at the Hauser residence in Elm Grove.

The prosecution of this case was significant in terms of the serious nature of the offense as well as the fact that there were no available witnesses to Vretta's criminal conduct, presenting a classic circumstantial case for trial. The evidence at trial included the testimony of more than 60 witnesses including forensics experts in the fields of blood, fibers, fingerprints, hair, handwriting and pathology.

The case was tried before U.S. District Judge Terence T. Evans and a jury over a period of eight trial days commencing on October 1, 1984. At the conclusion of the trial the defendant was found guilty and sentenced to a term of life in prison. His conviction was affirmed on appeal. United States v. Samuel Vretta, 790 F.2d 651 (7th Cir. 1986).

My participation in the prosecution of this case included responsibility for presentation of the case to the grand jury for indictment, all pretrial motions, preparation of the case for trial including interviewing witnesses and preparation of exhibits and jury instructions as well as the conduct of the trial itself. Assistant U.S. Attorney Stephen J. Liccione assisted me in all aspects of trial preparation as well as in the trial itself.

Defendant was represented by:

Glenn C. Reynolds, Esq.
145 West Wilson Street
Madison, Wisconsin 53703
Telephone 608-255-9491

Other government counsel:

Stephen J. Liccione, Esq.
Assistant U.S. Attorney
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-291-1700

United States v. Tony Fish and Ramon Torres

Criminal Case No. 82-Cr-109, E.D. Wisconsin

Tony Fish and Ramon Torres, both Indians, were charged with kidnapping, conspiracy to commit murder, and first degree murder in a three-count indictment filed on August 25, 1982. These charges stemmed from the abduction and kidnapping of Thomas Peterson, a non-Indian, from his automobile at a wayside along Highway 47 in Shawano County, which is adjacent to the Menominee Indian Reservation, as well as Peterson's subsequent murder which occurred on the Menominee Reservation a few miles away, all of which occurred during the early morning hours of July 30, 1982.

The significance of this prosecution derives from the seriousness of the offenses with which the defendants were charged and the government's proof at trial which established the defendants' Indian status. The testimony of witnesses as well as physical and forensic evidence also established that the victim was kidnapped in Shawano County and removed to the Menominee Reservation where he was strangled, stabbed and thrown into the river, where he drowned.

Following a five-day jury trial before U.S. District Judge Robert W. Warren, both defendants were found guilty of kidnapping, conspiracy to commit murder, and second degree murder, a lesser-included offense. Both defendants received consecutive life sentences on each of the three counts. The defendants appealed their convictions, which were affirmed in an opinion reported at 733 F.2d 449 (7th Cir. 1984).

My participation in this case included approval of the charges presented to the grand jury by Assistant U.S. Attorney R. Jeffrey Wagner. In addition, I assisted Mr. Wagner in preparing the case for trial including interviews of witnesses and jury instructions as well as participation in all aspects of the conduct of the trial itself with Mr. Wagner.

Tony Fish was represented by:

Thomas M. Croke, Esq.
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Telephone 414-271-9811

Ramon Torres was represented by:

Gerald R. Turner, Esq.
229 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-278-7865

Other government counsel:

R. Jeffrey Wagner, Esq.
Assistant U.S. Attorney
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-291-1700

Edward Reischl v. United States

Civil Case No. 77-C-448, E.D. Wisconsin

Plaintiff, Edward Reischl, commenced a medical malpractice action against the United States under the Federal Tort Claims Act in July 1977 in which he sought $500,000 in damages on account of the alleged negligence of physicians and medical personnel employed at the Veterans Administration Hospital in Iron Mountain, Michigan. Reischl was a patient at the hospital in December 1975, seeking treatment for headaches and dizziness. Plaintiff contended that he fell while attempting to get to bathroom facilities in the early morning hours, suffering a serious skull fracture and other alleged permanent injuries. Plaintiff contended the fall was the result of a hypotensive incident brought on by a combination of medications prescribed by hospital medical personnel. The United States defended the action, contending that the medications did not cause the plaintiff's fall and that he was contributorily negligent in getting out of bed during the night without calling for assistance.

The significance of the case lies in the fact that, although the action was brought and tried in the Eastern District of Wisconsin, Michigan tort law governed since plaintiff's injuries occurred in Michigan where a pure comparative negligence is the governing law in tort cases.

I represented the interests of the United States in the matter, including all pretrial motions, discovery depositions, preparation of stipulated facts and trial of the matter, which occurred before

U.S. District Judge Terence Evans on April 1 and 2, 1980. Following the trial, Judge Evans issued an unpublished written decision in which he determined damages to be $77,153.80 and, at the same time, found plaintiff 60% at fault, resulting in a net damage award of $30,861.52.

Plaintiff was represented by:

Richard A. Boltz, Esq.
Daniel D. Whetter, Esq.
425 South Adams Street
Green Bay, Wisconsin 54301
Telephone 414-432-5551

Theresa M. Hervey v. United States

Civil Case No. 76-C-299, E.D. Wisconsin

Plaintiff, Theresa Hervey, age 22, commenced the above-entitled action in May 1976 against the United States under the Federal Tort Claims Act, seeking $3,000,000 in damages as a result of personal injuries she sustained while in federal custody serving a sentence under the Federal Youth Corrections Act for the September 1984 armed robbery of a Shorewood bank. Hervey suffered a cerebral vascular accident in February 1975 while in custody at the Federal Correctional Institution in Alderson, West Virginia. The stroke, which left Hervey paralyzed on her right side together with other permanent injuries, was caused by inadequate medical attention and lack of medication for systemic lupus erythematosis, an illness which had been diagnosed in October 1974 during the pendency of the criminal charges against her.

In an opinion reported at 450 F. Supp. 1148 (E.D. Wis. May 25, 1978), the district court granted plaintiff's motion for summary judgment as to liability which the government had conceded and at the same time ruled on other pretrial issues.

As Deputy U.S. Attorney supervising civil litigation, I assisted Assistant U.S. Attorney William E. Callahan, Jr. in preparing the damage portion of the case for trial, with particular emphasis on the economic loss for past and future earnings. During the trial I personally handled the cross-examination of plaintiff's experts who testified with respect to economic loss and at the same time conducted the direct examination of the government's expert on this issue.

The significance of the case was in the potential loss in money damages to the United States as well as effective preparation in dealing with plaintiff's expert economist, which ultimately led to a significant reduction in the actual economic damage award from $444,885 which had been sought by plaintiff's counsel in their proof at trial to an actual award of $185,724. The case was tried to U.S. District Court Chief Judge John W. Reynolds sitting without a jury during the period December 12, 1978 through December 14, 1978. The court issued an unpublished opinion on January 16, 1979 awarding total damages of $703,022.

Plaintiff was represented by:

W. Robert Lotz, Esq.
118 East Third Street
Covington, Kentucky 41011
Telephone 606-491-2206

Reginald W. Nelson, Esq.
Whyte & Hirschboeck
2100 Marine Plaza
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-271-8210

Other government counsel:

William E. Callahan, Jr., Esq.
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-276-0200

Hellerman v. Romney, et al.

Civil Case No. 71-C-598, E.D. Wisconsin

Plaintiff commenced this action against the Secretary of Housing and Urban Development and the Federal Housing Commissioner in November 1971, pleading twelve separate causes of action. He sought judicial relief in the form of a $98,000 increase in the mortgage amount on his $900,000 multi-family housing project as well as money damages totaling $185,000 stemming from a number of other alleged irregularities in the financing, cost certification, loan servicing, rent subsidy and replacement reserve for the project.

The case was significant since it represented a challenge to the long-standing policies and procedures utilized by the Department of Housing and Urban Development in implementing the National Housing Act as applied to thousands of federally assisted housing projects across the country.

My participation in representing the interests of the Secretary of the Department of Housing and Urban Development and the Federal Housing Commissioner included handling pretrial motions, all pretrial discovery, negotiations between plaintiff's counsel and the Department of Housing and Urban Development in an attempt to administratively resolve the case short of trial as well as the trial of the case, which was conducted over a four-day period before U.S. District Judge Myron Gordon on November 4 through November 7, 1975. With the exception of recovery of approximately $1,100 in interest on the replacement reserve, Hellerman was unsuccessful on the merits of his claims. Judge Gordon's decision in the case is reported at 409 F. Supp. 352 (E.D. Wis. February 11, 1976). I represented the interests of the defendants throughout the litigation with the exception of postjudgment motions, which were handled by Assistant U.S. Attorney William E. Callahan, Jr.

Plaintiff was represented by:

Irvin Charne, Esq.
F. Thomas Olson, Esq.
Charne, Glassner, Tehan, Clancy & Taitelman
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Telephone 414-273-2000

United States v. George William Turner, et al.

Criminal Case No. 74-Cr-29, E.D. Wisconsin

George William Turner, a Canadian citizen, and nine codefendants were charged in a major multiple-count indictment which charged two separate conspiracies to import and distribute cocaine and heroin in violation of federal law. The first count stemmed from the criminal activities of Turner and seven codefendants, including Bonnie Biele, in Vancouver, British Columbia and the Eastern District of Wisconsin, while the second count related to the activities of Turner and two associates in Montreal, Quebec and the Milwaukee area. Turner and Biele were arrested in Florida shortly after the return of the indictment and were returned to Milwaukee to stand trial. As the remaining defendants were either fugitives or involved in lengthy extradition proceedings in Canada which ultimately took more than two years to complete, Turner and Biele were tried separately in November 1974.

The charges contained in the indictment followed an extensive ongoing investigation involving the use of court-authorized wiretaps and extensive cooperation between Canadian and United States law enforcement authorities to ferret out the defendants' cocaine and heroin distribution network.

Biele and Turner were tried before U.S. District Judge Myron Gordon and a jury during the period November 4 to November 13, 1974. Following the trial, the jury returned a verdict of guilty as to defendant Turner on Count 2 and at the same time found both defendants not guilty as to Count 1.

Turner escaped from federal custody in December 1974 prior to sentencing and remained a fugitive until his arrest in New York State in 1980. He was returned to Wisconsin and Judge Gordon imposed a fourteen-year prison sentence together with a $25,000 fine in connection with the 1974 conviction. At the same time, Turner entered a guilty plea to federal escape charges before U.S. District Judge Terence Evans, for which he received a four-year sentence to run concurrent with the sentence imposed by Judge Gordon.

Following the imposition of sentence, Turner appealed his drug conspiracy conviction to the Seventh Circuit Court of Appeals. The conviction was affirmed in an unpublished opinion by the court in May 1981.

The significance of this case lies in the fact that it represents one of the early significant cocaine-heroin trafficking cases prosecuted in the Eastern District of Wisconsin together with the fact that court-authorized wiretaps were utilized in the investigation and prosecution of the case.

My participation in the case included assisting Assistant U.S. Attorney Terry E. Mitchell in preparing the case for trial, which included technical aspects of the case related to the tapes and transcripts of the court-authorized wiretaps, exhibits, and drafting stipulations for the testimony of 17 of the government's witnesses. In addition, I participated in the trial itself as co-counsel with Mr. Mitchell as well as prosecuted Mr. Turner for escape and represented the interests of the government in connection with his appeal, including preparation of the government's brief and arguing the case before the Court of Appeals.

Defendant Turner was represented in the trial court by:

William M. Coffey, Esq.
Dennis P. Coffey, Esq.
Coffey, Coffey & Geraghty
3127 West Wisconsin Avenue
Milwaukee, Wisconsin 53208
Telephone 414-344-5700

Turner was represented in connection with his appeal by:

Richard B. Chernov, Esq.
Chernov, Croen & Stern
330 East Kilbourn Avenue
Milwaukee, Wisconsin 53202
Telephone 414-276-4080

Defendant Bonnie Biele was represented by:

Marvin Margolis, Esq.
Margolis and Cassidy
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-272-5333

Other government counsel:

Terry E. Mitchell, Esq.
225 East Michigan Street
Milwaukee, Wisconsin 53202
Telephone 414-276-5300

United States v. Victor N. Radionov

Criminal Case No. 73-Cr-232, E.D. Wisconsin

Victor N. Radionov was indicted by a grand jury for violation of the Hobbs Act in connection with his attempt to extort $250,000 from Ben Marcus, a prominent Milwaukee hotel owner, in June 1973. The gist of Radionov's criminal conduct was that he had made a series of threatening telephone calls to Marcus over a period of several days demanding large sums of money which, if not provided, would result in Radionov bombing two hotels in which Marcus held an ownership interest. Prior to trial Radionov was examined by two psychiatrists relative to his mental condition. During the initial stages of a jury trial which had commenced in October 1973 before U.S. District Judge John W. Reynolds, the court on its own motion found Radionov incompetent to stand trial and committed him to the Federal Medical Center at Springfield, Missouri for treatment, to be followed by a further court hearing as to competency. In March 1974 the court held a one-day evidentiary hearing as to Radionov's competency following which the court concluded that Radionov was then competent to stand trial.

Following a four-day jury trial before Judge Reynolds, which commenced on March 18, 1974, defendant was convicted of the offense with which he was charged. The principal factual issue for jury resolution during trial was whether Radionov was competent at the time he committed the offense since the evidence of his criminal conduct was otherwise overwhelming. Radionov appealed his conviction to the Seventh Circuit Court of Appeals, which affirmed in an unpublished opinion.

This case was significant due to the seriousness of the offense coupled with the issues of the defendant's competency to stand trial as well as his competency at the time of the commission of the offense.

My participation in this case included representing the interests of the United States in preparing for and handling the competency hearing held before the court on March 11, 1974 as well as preparing the case for trial and actually trying the case with United States Attorney David B. Bukey as co-counsel. My principal role in the trial was to handle the direct examination of the government's expert and all cross-examination of the defendant's experts on the issue of the defendant's competency at the time of the offense.

Defendant was represented by:	Other government counsel:
Robert J. Lerner, Esq. 1219 North Cass Street Milwaukee, Wisconsin 53202 Telephone 414-272-7400	David B. Bukey, Esq. 3000 Smith Tower Seattle, Washington 98104 Telephone 206-343-9391

United States v. William H. Ferber, Jr.

Criminal Case No. 70-Cr-119, E.D. Wisconsin

In September 1970 Willaim H. Ferber was charged with three counts of filing false and fraudulent Form 1040 individual tax returns for calendar years 1964 through 1966, inclusive. Ferber, the owner of a metal fabricating business, was alleged to have underreported his income by $4,979 in 1964, $53,928 in 1965 and $45,107 in 1966.

Following a three-day trial to the court which commenced on September 21, 1971, Mr. Ferber was convicted on the counts relating to 1965 and 1966 and acquitted on the count relating to 1964. He received a four-month prison sentence.

This case was significant in that it involved a lengthy accounting analysis of Mr. Ferber's personal and business bank accounts as well as his customers' business and bank records. This proof was submitted as evidence to establish that Ferber had received significant additional income which had not been reported on his individual tax returns.

I represented the United States in prosecuting this case, including handling pretrial motions, the deposition of Mr. Ferber's accountant, preparation of the case for trial, and presentation of all the government's evidence at trial as well as the cross-examination of witnesses called by the defendant including Mr. Ferber, who testified in his own defense. The case was tried before U.S. District Judge John W. Reynolds.

Mr. Ferber was represented by:

Robert E. Meldman, Esq.
Mulcahy & Wherry
815 East Mason Street
Milwaukee, Wisconsin 53202
Telephone 414-278-7110

United States v. John Kwitek

Criminal Case No. 68-Cr-136, E.D. Wisconsin

Kwitek was one of five individuals charged in Case No. 67-Cr-154 with the $22,000 armed robbery of the Bank of Greenfield, which occurred on July 26, 1967. While in custody awaiting trial Kwitek escaped and, upon apprehension, pleaded guilty to the bank robbery charge and was sentenced. His conviction was vacated on technical grounds when it was discovered that the indictment failed to reference the federally insured status of the bank, a requirement for federal jurisdiction.

A second indictment in proper order was obtained in December 1968 and, following a jury trial before Judge John W. Reynolds, Kwitek was found guilty. The verdict was set aside, however, and a mistrial declared when it was learned that a summary of Kwitek's prior criminal convictions had mistakenly been included with other exhibits submitted to the jury as part of their deliberations.

Kwitek was found guilty after a second jury trial before Judge Reynolds; however, on appeal the case was remanded for a new trial by the Seventh Circuit Court of Appeals. The court determined that a handgun seized by the FBI from a Chicago hotel room without a search warrant at the time of Kwitek's arrest had been improperly admitted as evidence. See United States v. Kwitek, 433 F.2d 18 (7th Cir. 1970).

Kwitek was convicted yet a third time following a jury trial before Judge Myron Gordon which was affirmed on appeal. United States v. Kwitek, 467 F.2d 1222 (7th Cir. 1972), cert. denied, 409 U.S. 1079 (1973). Kwitek later filed a motion for a new trial on the basis of newly discovered evidence. Judge Gordon denied the motion at the conclusion of an evidentiary hearing in February 1974.

This case is significant in light of its obvious checkered history as well as the fact that the evidence against the defendant was largely circumstantial, particularly during the third trial when two co-defendants who had previously been convicted refused to testify after having been granted immunity. Both were summarily punished for contempt.

My participation in the case began in early 1970 when I represented the interests of the United States in Kwitek's first appeal in connection with the preparation of the government's brief and oral argument before the Seventh Circuit Court of Appeals. In addition, I handled the third trial as well as the second appeal, including preparation of the brief and oral argument as well as the hearing on Kwitek's motion for a new trial. Although I was principally responsible for the case assignment, I did receive limited assistance from then-Assistant U.S. Attorney Richard P. Broder, who conducted the examination of several of the government's witnesses during trial. The third trial was held before U.S. District Judge Myron Gordon and a jury February 23 through February 25, 1971.

The defendant was represented at trial and on appeal by:

David J. Hase, Esq.
Foley & Lardner
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-271-2400

On his motion and evidentiary hearing for a new trial Kwitek was represented by:

Thomas A.G. Herz, Esq.
Michael, Best & Friedrich
250 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Telephone 414-271-6560

United States v. Zager

Civil Case No. 67-C-384, E.D. Wisconsin

This action was commenced in January 1967 by the United States against Harold Zager and his wife Carol to quiet title in 75 acres of land allegedly owned by the United States which abutted Lake Julia located in the Nicolet National Forest in Forest County, Wisconsin. The defendants had brought a similar action against the United States and then Secretary of Interior, Stuart Udall, in Forest County Circuit Court in 1965. The action was removed to the federal court by the United States and a motion to dismiss was simultaneously filed. In an opinion reported at 256 F. Supp. 396 (E.D. Wis. June 25, 1966) the court granted the government's motion to dismiss as to the United States but declined as to defendant Udall. When Udall failed to timely respond to plaintiffs' complaint, plaintiffs' counsel obtained a default judgment in October 1966. After unsuccessfully attempting to reopen the prior case the United States filed its own quiet title action to remove the cloud created on the title to the property as a result of the default judgment obtained by the Zagers. The defendants moved for dismissal of the government's complaint; however, the court denied same in an opinion reported at 280 F. Supp. 877 (E.D. Wis. February 6, 1968).

I was assigned the file in the summer of 1970 to represent the interests of the United States and to prepare the case for trial. Very little had been done substantively on the case to that point, given the fact that the case had been in litigation for more than five years. I spent considerable time reviewing numerous documents, many of which dated to the 1850's, in preparing the case for trial as well as obtaining stipulations from defendants' counsel with respect to the use and authentication of documents. The significance of the case lies in its relative complexity coupled with preparation for trial on relatively short notice.

The case was tried to Judge John W. Reynolds sitting without a jury over a three-day period commencing on December 14, 1970. The court issued a written opinion ruling in defendants' favor which is reported at 338 F. Supp. 984 (E.D. Wis. February 29, 1972). I received some assistance in the area of legal research from then-Assistant U.S. Attorney Richard P. Broder who, although present in the courtroom during trial, did not actually participate in the conduct of the trial itself.

The defendants in the action were represented by:

Robert J. Kay, Esq.
Geisler & Kay
Suite 500, 433 West Washington Avenue
Madison, Wisconsin 53703
Telephone 608-257-4401

19. Q. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

A. As previously detailed in my response to question 9, I have participated extensively in the governance, activities and programs of the organized bar at the local, state and national levels through the Milwaukee Young Lawyers Association, the State Bar of Wisconsin, the American Bar Association, and the Seventh Circuit Bar Association.

I have also served as a member of the District Grievance Committee (Milwaukee County) from 1980 through 1985 and also served as Chairman of the thirty-member Committee during 1984 and 1985. The work of the Committee is directed toward the investigation of alleged professional misconduct by members of the bar and recommended findings of fact as well as disciplinary action to the Board of Attorneys Professional Responsibility.

During the period, 1976 through 1979, I also served as an elected member of the Judicial Selection Committee of the Milwaukee Bar/Milwaukee Young Lawyers which screened and recommended candidates to the Governor for appointment to the state courts in Milwaukee County.

In addition, on many occasions during the period, 1975 through 1983, I have also instructed on various aspects of trial work at the Attorney General's Advocacy Institute, Washington, D.C. for new Assistant U.S. Attorneys.

I am also a participating member of the Seventh Circuit Criminal Jury Instruction Committee which has been drafting and publishing pattern jury instructions for use in federal criminal cases.

Some other examples of case-related litigation which I handled which did not go to trial include the following:

Squillacote, et al. v. United States, 81-C-1553, E.D. Wisconsin

As United States Attorney, I represented the interests of the United States in a class action brought by some 9,400 members of the Senior Executive Service who filed suit in the Eastern District of Wisconsin under The Tucker Act to recover unpaid portions of their Schedule SES salaries for fiscal years 1979, 1980 and 1981, respectively. Plaintiffs contended in their suit that payment of their full salaries had been denied in violation of the provisions of the Civil Service Reform Act, specifically, 5 U.S.C. 5382(b). The government contended that the congressionally enacted pay caps applicable to federal employees during each of the years precluded payment of the amount sought by plaintiffs.

Following certification of the matter as a class action and agreement of the parties that there were no genuine issues of material fact, the case was submitted to the District Court on cross-motions for summary judgment. In an opinion and order entered on April 21, 1983, which is reported at 562 F.Supp. 338 (E.D. Wis. 1983), the District Court granted the government's motion for summary judgment and dismissed plaintiffs' action. An appeal was taken from the District Court to the Seventh Circuit Court of Appeals which, following further briefs and oral argument, reversed the District Court's decision as to fiscal years 1979 and 1980, finding that the pay cap legislation did not apply to SES employees. The decision resulted in members of the class receving a back pay award totally more than $38,000,000.

United States v. Metropolitan Child Adolescent and Family Services, Inc., 78-CR-174, E.D. Wisconsin

As a result of a joint federal, state and local investigation which was conducted before a federal grand jury in 1978, Metropolitan Child Adolescent and Family Services, Inc. plead quilty to four counts of Medicaid fraud for overbilling the Wisconsin Department of Health and Social Services more than $750,000 during the period, 1973 through 1976. The agency plead guilty to all four counts, made complete restitution, and was fined $40,000 in connection with the overbilling. During the course of this investigation and prosecution, I supervised the work of an Assistant Attorney General and a local Assistant District Attorney, both of whom who had been cross-designated as Special Assistant United States Attorneys.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (Public)

1. Q. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   A. None

2. Q. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   A. In the unlikely event any potential conflict of interest would arise, I would take whatever steps were necessary and appropriate to withdraw or resign from any activity or interest giving risk to the conflict.

3. Q. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so explain.

   A. No

4. Q. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   A. No.

5. Q. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   A. Not Applicable

6. Q. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

A. Financial Net Worth Statement attached.

FINANCIAL STATEMENT JOSEPH P. STADTMUELLER
NET WORTH MARCH 10, 1987

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand and in banks	$11,984.15
U.S. Government securities—add schedule	
Listed securities—add schedule	
Unlisted securities—add schedule	
Accounts and notes receivable:	
Due from relatives and friends	
Due from others	
Doubtful	
Real estate owned—add schedule	$149,500.00
Real estate mortgages receivable	
Autos and other personal property	$65,700.00
Cash value—life insurance	$14,774.41
Other assets—itemize:	
EMPLOYEE CONTRIBUTIONS TO CIVIL SERVICE RETIREMENT FUND	$39,024.82
Total assets	$280,983.38

LIABILITIES	
Notes payable to banks—secured	
Notes payable to banks—unsecured	
Notes payable to relatives	$4,000.00
Notes payable to others	
Accounts and bills due	
Unpaid income tax	
Other unpaid tax and interest	
Real estate mortgages payable—add schedule	$36,787.00
Chattel mortgages and other liens payable	
Other debts—itemize:	
Total liabilities	$40,787.00
Net worth	$240,106.38
Total liabilities and net worth	$280,983.38

CONTINGENT LIABILITIES	NONE
As endorser, comaker or guarantor	
On leases or contracts	
Legal Claims	
Provision for Federal Income Tax	
Other special debt	

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.) NO	
Are you defendant in any suits or legal actions? NO	
Have you ever taken bankruptcy? NO	

REAL ESTATE OWNED (PERSONAL RESIDENCE)

5451 N. HOLLYWOOD AVENUE
WHITEFISH BAY, WISCONSIN 53217

VALUATION $149,500.00

REAL ESTATE MTGE PAYABLE (PERSONAL RESIDENCE)

M & I GROOTEMAAT MORTGAGE CO.
MILWAUKEE, WISCONSIN 53202

BALANCE DUE $36,787.00

III. GENERAL (Public)

1. O. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A. It is my personal conviction that under the Constitution and the doctrine of separation of powers, the role of the Federal judiciary, as an institution, is limited to interpreting, not making, the law.

Consequently, as an advocate for judicial restraint, I find myself in agreement with those who have urged that judicial activism has become a vehicle for legislative action and social engineering, neither of which can be subject to the prerogatives of individual judges.

In this regard, I believe that Justice Frankfurter said it best when he wrote in Baker v. Carr, 369 U.S. 186 (1962), at page 270:

> [t]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused to so enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.

In further resonse to this question, I wish to also add that while courts should leave to the executive and legislative branches of government matters which under the Constitution are properly entrusted to them, it also follows that courts must be prepared to act when in a given case or controversy individual rights, protected under the Constitution, have not been addressed at the appropriate level of government.

2. Q. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

A. I believe that my sixteen years of public service with the Department of Justice, which includes ten years as an Assistant and First Assistant U.S. Attorney as well as six years of service as United States Attorney, amply bespeaks my concern for equal justice under the law. I would first invite attention to the organizational structure, hiring and promotional practices of the office during my tenure as United States Attorney. Specifically, more than thirty percent of the attorney staff which I have hired represent women and minorities. In addition, my First Assistant is a woman.

The prosecution policies of my office, together with the review process for individual cases, provides for fair and forthright treatment of each case while at the same time recognizes the interests and concerns of victims, witnesses, and the community as well as the priorities of law enforcement. At the same time, my relationship with my entire staff, the courts, our client agencies, opposing counsel, and the public we serve has been and continues to be excellent in every respect. In addition, I have always taken pride in my ability to maintain an open mind in addressing any matter or controversy while at the same time, possessing the ability and patience to garner all of the facts and move forward in making a fair and impartial decision without bias or prejudice.

I would further submit that, as developed in earlier responses to this Questionnaire, my service in many activities of the organized bar, including service as a member of the Board of Governors of the State Bar of Wisconsin as well as Chairman of the State's largest District Grievance Committee, have all provided me with additional opportunities to demonstrate my personal commitment to equality under the law.

Insofar as my personal life is concerned, I have been married for more than sixteen years and blessed with two children, one of whom is adopted. I have also been involved in a number of community and church activities, all of which further serves to exemplify my concern for equal justice under the law.

Although my position with the Department of Justice has generally precluded my being highly visible with regard to pro bono activities, I would again submit that my contributions over the years to the organized bar, specifially the Milwaukee Young Lawyers Association and the State Bar of Wisconsin, both of which have undertaken significant pro bono activities including landlord/tenant hotline, clinics and seminars for the elderly and handicapped as well as public information programs, all of which demonstrate my commitment to pro bono work directed toward those in our society who are otherwise unable to avail themselves of legal services. In addition, I have personally spoken to various community and senior citizen groups over the years on law-related topics. Since I am unable to accept any court appointments, I have also contributed financially to the Legal Aid Society which undertakes representation of the disadvantaged in civil cases.

As a member of the Local Court Rules Committee, I supported the Committee's sponsorship of a Pro Bono Civil Representation Seminar held in November of 1985, which served to provide information to lawyers willing to accept civil appointments to handle Title VII, social security and Section 1983 civil litigation on a pro bono basis. This month, I will also be participating in an Appellate Practice Seminar for lawyers handling appeals in these and other areas which again is being sponsored by our Local Court Rules Committee, the Seventh Circuit Bar Association and the Milwaukee Bar Association. Finally, as a strong advocate for the interests of victims and witnesses, as United States Attorney I was able to secure one of the forty-seven Victim/Witness-LECC Coordinator positions authorized by Congress for the ninety-three U.S. Attorney's Offices.

JUDICIARY COMMITTEE
1987 MAR -9 PM 6:23

AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
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March 4, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: JOSEPH P. STADTMUELLER
United States District Court
Eastern District of Wisconsin

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Joseph P. Stadtmueller for appointment as Judge of the United States District Court for the Eastern District of Wisconsin.

Our Committee is unanimously of the opinion that Mr. Stadtmueller is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

ROGER B. ANDEWELT

Birth:	August 4, 1946	Brooklyn, New York
Legal Residence:	District of Columbia	
Marital Status:	Married	Maxine Mitchnick Andewelt 2 children
Education:	1963 - 1967	Brooklyn College B.S. degree
	1967 - 1971	George Washington University National Law Center J.D. degree
Bar:	1972	New York
Experience:	1968 - 1972	United States Patent Office Patent Examiner
	1972 - present	Department of Justice Appellate Section Trial Attorney, '72-'74 Intellectual Property Sec. Trial Atty, '74-'78 Assistant Chief, '78-'81 Chief, '81-'84 Deputy Director of Operations, '84-'86 Deputy Assistant Attorney General for Litigation, 6/86 - present

Office:
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
202 633-2562

Home:

To be a Judge of the United States Claims Court

I. BIOGRAPHICAL INFORMATION (PUBLIC)

COMMITTEE
MAR -9 PM 5:07

1. Full name (include any former names used).

   Answer: Roger Barry Andewelt

2. Address: List current place of residence and office address(es).

   Answer: Office: U.S. Department of Justice
   Antitrust Division, Room 3208
   10th and Pennsylvania Avenue, N.W.
   Washington, D.C. 20530

3. Date and place of birth.

   Answer: August 4, 1946; Brooklyn, New York

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Answer: Married; Maxine (Mitchnick) Andewelt
Chief, Teleprocessing Services Branch
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Answer: Brooklyn College
Bedford Avenue, Brooklyn, New York
Date: Sept./1963 - June/1967
Degree: B.S. Chemistry

National Law Center, George Washington University
20th and G Streets, N.W., Washington, D.C.
Date: Sept./1967 - Feb./1971
Degree: Juris Doctor

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Answer:

October 1972 - Present	Antitrust Division U.S. Department of Justice
June 1968 - October 1972	Patent Examiner United States Patent and Trademark Office Department of Commerce

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Answer: No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Answer:

1986 -	Senior Executive Service Bonus of $5,000
1985 -	Senior Executive Service Bonus of $7,500
1984 -	In recognition of my efforts in drafting proposed legislation for the Administration in the Antitrust and technology area (the proposed National Productivity and Innovation Act), and in recognition of my efforts through the years at helping to formulate Executive Branch policy in the areas of antitrust, and the protection and exploitation of intellectual property, I was nominated by the Department for the Presidential Award of the Rank of Distinguished Executive. While ultimately I was not selected for the award, I received instead an SES bonus of $10,000.

1983 -	Attorney General Awards Ceremony - Special Commendation Award for Outstanding Services to the Antitrust Division.
1982 -	In its annual "Ammy Awards" the American Lawyer awarded me "Honorable Mention" as Government Attorney of the Year in recognition of my work and the work of my staff in the investigation of DuPont's acquisition of Conoco.
1980 -	Attorney General Awards Ceremony - Special Commendation Award for Outstanding Services to the Antitrust Division.
1982-1986 -	Awards for Outstanding Performance Ratings
Educational:	Juris Doctor Decree Awarded with Honors. Ceremonial acceptance of law degree for entire graduating class (as a result of academic ranking of #2 in graduating class).

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Answer: American Bar Association
American Bar Association Antitrust Section
American Bar Association Intellectual Property Section
Adjunct Member of the Committee on Antitrust and Trade Regulation for The Association of the Bar of the City of New York

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

Answer: Parents' Associations - Georgetown Day School
Aiden Montessori School

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Answer: Admitted to practice in New York State (Feb. 1972)
Admitted to practice before United States Patent and Trademark Office - 1972

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Answer:
"The Antitrust Division's Perspective on Intellectual Property Protection and Licensing--The Past, The Present and The Future" before the American Bar Association Patent, Trademark & Copyright Section, London, England, July 16, 1985. 30 Patent, Trademark & Copyright Journal (BNA) No. 739 at 319-324 (July 25, 1985).

"Analysis of Patent Pools Under The Antitrust Laws" before the National Institute on Industrial and Intellectual Property, October 11-12, 1984. 53 Antitrust Law Journal 611-639.

"The National Productivity and Innovation Act of 1983" --An Effort to Improve the Legal Climate for the Creation and Exploitation of Intellectual Property" before the Los Angeles Patent Law Association, Los Angeles, California, November 15, 1983. 27 Patent, Trademark & Copyright Journal (BNA) No. 656 at 100 (Nov. 24, 1983).

"Competition Policy and the Patent Misuse Doctrine" before the Bar Association for the District of Columbia, Patent, Trademark, and Copyright Section, Washington, D.C., November 3, 1982. Patent, Trademark & Copyright Journal (BNA) No. 559, at D-1 (Nov. 11, 1982).

"Basic Principles to Apply at the Patent-Antitrust Interface" before the Houston Patent Law Association, Houston, Texas, December 3, 1981. 25 Patent, Trademark & Copyright Journal (BNA) No. 604 at 31 (Dec. 17, 1981).

13. Health: What is the present state of your health? List the date of your last physical examination.

Answer: My health is excellent. My last physical examination was November 11, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Answer: None

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Answer: Not applicable

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Answer: None

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

Answer: a) From October 1972 - November 1974 I served as an attorney in the Appellate Section of the Antitrust Division of the U.S. Department of Justice. My work focused on issues involving the antitrust laws and patent and other intellectual property laws, and the decisions of certain administrative agencies, including the Federal Communications Commission and Interstate Commerce Commission. My responsibilities included drafting memoranda to the Solicitor General and the Assistant Attorney General for Antitrust recommending for or against filing (1) petitions for writ of certiorari in the Supreme Court, (2) appeals to the Supreme Court from district court or court of appeals decisions, (3) appeals to courts of appeals from district court decisions, and (4) briefs as amicus curiae in the appellate courts. In addition, I prepared drafts of jurisdictional statements, motions to affirm or dismiss, and briefs on the merits in the Supreme Court and drafted briefs on the merits in cases before United States Courts of Appeals and represented the United States on oral argument twice before three-judge district court panels.

b) From November 1974 - October 1978 I served as a trial attorney in the Patent (later renamed Intellectual Property) Section of the Antitrust Division. I participated in civil and criminal investigations and litigation involving enforcement of the antitrust laws, patent laws, and related criminal laws. Civil practice included various phases of discovery and trial as co-counsel of United States v. Studiengesellschaft Kohle, m.b.H. (see p. 14 infra.). In addition, I represented the United States on briefs in the Supreme Court and Courts of Appeals in patent and patent-antitrust-related cases.

c) From October 1978 - November 1984 I served as Assistant Chief, Acting Chief and Chief of the Intellectual Property Section of the Antitrust Division. The Chief and Assistant Chief supervise all work done by the Intellectual Property Section staff which included 14-16 attorneys, 6-8 secretaries and 2 paralegals. The Section had responsibility for civil and criminal federal antitrust investigations and litigation in the areas of intellectual property (patents, trademarks, copyrights and proprietary information), labor, chemicals, pesticides and pharmaceuticals. In addition, during my tenure the Section frequently was assigned antitrust enforcement responsibility with respect to major corporate acquisitions in other commodity areas (e.g., DuPont's acquisition of Conoco; Bendix's offers for Martin-Marietta and Allied's responding offer for Bendix). Because of the public importance and the complexity of the typical antitrust case, supervision of staff tended to be active. The Chief and Assistant Chief typically reviewed all written correspondence and all court filings and participated extensively in developing and implementing strategies for investigation, settlement, and trial.

As Chief and Assistant Chief I also had primary responsibility for virtually all intellectual property-related issues considered by the Antitrust Division including participation on interagency task forces, amicus court filings, comments on legislative proposals, and the drafting of proposed legislation including the National Productivity and Innovation Act of 1983.

d) From November 1984 - June 1986 I served as Deputy Director of Operations of the Antitrust Division. In that capacity I held general supervisory responsibility over virtually all civil investigations and litigation performed by the Antitrust Division staff (approximately 300 attorneys). Responsibilities included authorizing the opening and closing of investigations, assignment of staff, approval of pleadings, motions, briefs, and other litigation documents and advising all chiefs of sections and field offices and other attorneys in the Division on litigation and other matters involving enforcement of the antitrust laws. In addition, I served as the Antitrust Division liaison with both the FBI and the Federal Trade Commission.

While the Assistant Attorney General is ultimately responsible for all decisions, the Deputy Director of Operations has wide latitude for independent and unreviewed action. In those instances where my decisions were reviewed, they generally were reviewed only with respect to policy and public interest considerations, rather then for soundness and technical accuracy. As Deputy Director of Operations, I continued to function as a Department of Justice expert on intellectual property matters, including as a participant on numerous interagency task forces including the interagency Working Group on Intellectual Property.

e) From June 1986 to the present I have been serving as Deputy Assistant Attorney General for Litigation in the Antitrust Division. In that capacity, based on consultations with the Assistant Attorney General for Antitrust, I have significant day to day responsibility for policy decisions arising from civil and criminal investigations and litigation conducted by the seven Antitrust Division field offices and two Washington litigation sections. I establish the emphasis on and priority of cases and investigations in these offices and review for policy adherence all legal documents emanating from them which are required by Department regulations to be signed by the Assistant Attorney General or the Attorney

General. Among the documents I review are requests to open grand juries, requests to grant immunity from criminal prosecution, proposed indictments and informations, Civil Investigative Demands and proposed civil suits. In addition, the Assistant Attorney General has delegated to me authority to issue "second request" letters, which have the effect of significantly delaying consummation of the proposed acquisitions and mergers until the Antitrust Division receives additional information and has additional time to consider the lawfulness of the proposed transaction.

In addition, at the frequent request of the Assistant Attorney General, I have reviewed regulatory, appellate and legislative matters pending before the Division which potentially affect current or proposed antitrust investigations and litigation, and frequently review these matters for general antitrust policy consideration. In addition, I represent the Attorney General and the Assistant Attorney General by participating in various forms of Executive Branch decision making, including participation in interagency task forces, on industry conference committees, at Departmental conferences involving policy questions and long-range planning, and before bar associations and business groups, etc. I have continued to function as the Division's expert on intellectual property issues.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Answer: As a part of Antitrust Division management, I have been involved in making litigation-related decisions on a daily basis since 1978. In view of my supervisory capacity, however, I have personally appeared in court only occasionally and often have not had any public identification with many matters with which I was involved. I am limiting my response to question 18 to instances where I appeared of record in the litigation or was personally involved in negotiations with opposing counsel. For each listed litigation that took place while I was in a supervisory position in the Antitrust Division, I had the general responsibilities for the litigation described in my response to question 9 supra.

1. Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979)

This litigation raised the issue of when the provisions of a trade secret license, which prevents the licensee from using a technology under certain circumstances, should be deemed unenforceable because it conflicts with the federal policy in favor of the full and free use of ideas in the public domain. The case raised basic issues of federal preemption of state contract law. The case was economically significant beyond its facts because if preemption were found, the general incentive of all trade secret owners to license their technologies could have been materially decreased. The Supreme Court found preemption not appropriate, agreeing with the position taken in a brief filed by the United States as amicus curiae.

After becoming aware of the court of appeals decision which found state contract law preempted, I initiated the proposal that the Department of Justice file an amicus brief in the Supreme Court in favor of reversal. I drafted the initial draft of the Memorandum to the Solicitor General analyzing the issues, and the amicus brief that was filed in the Supreme Court.

a) Case Argued December 6, 1978; Decided February 28, 1979.

b) Supreme Court

c) government counsel -
Barry Grossman - 272-4247
Antitrust Division
Washington, D.C.

other counsel -
I had no contact with other counsel during the course of the proceeding.

counsel for petitioner, Jane Aronson
C. Lee Cook, Jr. - (312) 876-2100
Chadwell & Kayser, Ltd.
8500 Sears Tower
233 South Wacker Drive
Chicago, IL 60606-6592

counsel for respondent - Quick Point Pencil Co.
Erwin N. Griswold - 879-3939
Jones, Day, Reavis & Pogue
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005

2. Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 (1980).

This litigation focused on a technical issue involving interpretation of Section 271(c) and (d) of the Patent Code (Title 35). The United States appeared in the Supreme Court as amicus curiae. The question was whether the owner of a patent covering a process of using an unpatented product is barred from charging a seller of the unpatented product with contributory infringement when the unpatented article constitutes a material part of the invention and is not suited for any other commercial use, and the patent owner exploits the patent exclusively through the sale of the unpatented product. This issue was economically significant because it established the proper scope of patent suits based on allegations of contributory infringement.

After becoming aware of the court of appeals decision, I coordinated the Antitrust Division's consideration of the issue of possible amicus participation. I had initial responsibility for the drafting of the Department's amicus brief in which the Department took the position that the patent owner could not prevail in such a contributory infringement suit. In a 5-4 decision the Supreme Court found to the contrary.

a) The case was argued on April 21, 1980 and decided on June 27, 1980.

b) Supreme Court

c) government counsel -
Robert V. Allen - (301) 237-4603
CSX Transportation, Inc.
100 N. Charles Street
Baltimore, MD 21201

Nicholas Clark - 466-1521
Assistant General Counsel
United Food & Commercial Workers
International Union

1775 K Street, N.W.
Washington, D.C. 20006

Robert B. Nicholson - 633-2489
Frederick Freilicher - 724-7811
Antitrust Division
Washington, D.C.

other counsel -
I had little contact with counsel for the parties to the case.

counsel for the petitioner - Dawson Chemical Co.
Ned L. Conley - (713) 237-3111
Butler & Binion
1600 Allied Bank Plaza
Houston, TX 77002

counsel for respondent - Rohm & Haas Co.
Rudolf E. Hutz - (302) 658-9141
Connolly, Bove, Lodge & Hutz
1220 Market Street
P.O. Box 2207
Wilmington, DE 19899-2207

3. American Waterways Operators, Inc. v. United States, 386 F. Supp. 799 (D.D.C. 1974)

This litigation involved the proper interpretation of the Panama Canal Act of 1912; specifically, under what circumstances a railroad should be precluded from purchasing and operating a barge line on the ground that they "compete for traffic." The case presented an important issue because competitors of the railroad were seeking to have the court adopt an interpretation of the statute that was anticompetitive in effect in that it would broadly prohibit railroads from becoming more efficient through vertical integration into barge line operation.

The United States was a statutory respondent in the matter. I drafted our brief and argued the case (twice) before three-judge district court panels. The United States took the position that the proposed acquisition was not barred by the statute and the court agreed.

a) The decision was rendered on December 18, 1974. I don't remember the dates of the oral arguments.

b) Three-Judge Panel (D.C. Cir.), Circuit Court Judge Robinson, District Court Judges Bryant and Smith

c) other counsel -
counsel for American Waterway Operations -
A. Alvis Layne
(deceased)

counsel for American Commercial Barge Line, Inc.
Arthur Winn, Jr. - 628-2788 (Retired)
LaRoe, Winn & Moerman
1120 G Street, N.W.
Washington, D.C. 20005

counsel for defendant - Interstate Commerce Commission
Betty Jo Christian - 429-3000
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

counsel for Intervenor - Southern Railway Co.
Charles A. Horsky - 662-6000
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

4. United States v. American Society of Composers, Authors and Publishers, et al., 586 F. Supp. 727 (S.D.N.Y. 1984)

In this litigation ASCAP sought to secure a modification of its 1950 Consent Decree so as to eliminate ASCAP's obligation to offer a certain type of copyright license to its music repetoire (a per program license) to those television networks that have a different type of license (blanket license). The issues raised in the litigation included the extent to which economic circumstances had changed after entry of the decree so as to render modification of the decree in the public interest. The litigation raised issues that were economically significant and fairly complex. Each of the broadcast networks and the major copyright licensing authorities as well as the local television station owners (through their All-Industry Committee) participated.

As Chief of the Intellectual Property Section, I had primary responsibility for overseeing enforcement of ASCAP's decree and concluded that we should oppose the proposed modification because it would have negative economic effects. The Department adopted my position and I was primarily responsible for drafting the Department's brief. The district court agreed with our position (there was no oral argument) and refused to modify the decree.

a) The judge's decision was entered on May 15, 1984.

b) Judge J. Conner (S.D.N.Y.)

c) government co-counsel
Weeun Wang - 724-7984
Antitrust Division
Washington, D.C.

other counsel
for ASCAP -
Allan Blumstein - (212) 373-3000
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019

General Counsel - ASCAP
Bernard Korman - (212) 595-3050
One Lincoln Plaza
New York, NY 10023

for Broadcast Music Inc. -
Robert J. Sisk - (212) 709-7000
Hughes, Hubbard & Reed
One Wall Street
New York, NY 10005

for All Industry Television Station Music License Committee -
R. Bruce Rich - (212) 310-8000
Weil, Gotshal & Manges
767 Fifth Avenue
New York, NY 10153

for American Broadcast Co. -
Philip R. Forlenza - (212) 820-9300
Hawkins, Delafield & Wood
67 Wall Street
New York, NY 10005

for CBS Inc. -
John E. Beerbower - (212) 422-3000
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10005

for NBC -
David R. Hyde - (212) 701-3000
Cahill, Gordon & Reindel
80 Pine Street
New York, NY 10005

5. *United States v. Studiengesellschaft Kohle, m.b.H.*, 426 F. Supp. 143 (D.D.C. 1976) *rev'd*, 670 F.2d 1122 (D.C. Cir. 1981)

This civil antitrust case charged that a license agreement between Karl Ziegler (predecessor to Studiengesellschaft Kohle, m.b.H.) and Texas Alkyls, Inc. constituted an unreasonable restraint of trade violative of Section 1 of the Sherman Act. The alleged offense was restricting the licensee of a process patent from selling an unpatented product made using the process. The case raised significant antitrust issues concerning the proper evaluation of the lawfulness of a patent license under the antitrust "rule of reason."

I served as co-counsel to lead counsel Kurt Shaffert during pretrial and trial of the case. I participated in the taking of depositions, arguing of pretrial motions, and took the trial testimony of a technical (chemistry) expert witness, Dr. Ashby of Georgia Tech. The district court found for the government (D.D.C.), but the Court of Appeals for the District of Columbia Circuit reversed.

a) The district court trial occurred from January 9, 1978 through January 12, 1981.

b) Judge Aubrey Robinson, Jr. presided.

c) government co-counsel
Kurt Shaffert - 724-8262
Hayes Gorey, Jr. - 724-6809
Antitrust Division
Washington, D.C.

counsel for Studiengesellschaft
Arnold Sprung - (212) 661-0520
Sprung, Horn, Kramer & Woods
600 Third Avenue
New York, NY 10016

6. *United States v. E.I. DuPont de Nemours & Co., Inc.*, 1982-1 Trade Cas. ¶ 64,479 (D.D.C. 1981)

This case was filed during my tenure as Chief of the Intellectual Property Section. It was the result of an investigation into DuPont's proposed acquisition of Conoco, which at the time was one of the largest corporate mergers ever. At one time or another a majority of the personnel of the intellectual Property Section was involved in the complex investigation. As as result of its broad scope, the investigation raised significant administrative issues concerning how efficiently to investigate major mergers within the statutory time deadlines and also major antitrust issues concerning proper definition of markets. The antitrust case that was filed raised significant issues including under what circumstances a potential exchange of information among joint venture partners could violate Section 7 of the Clayton Act and Section 2 of the Sherman Act because the exchange could facilitate collusion among the partners in the sale of products made using the output of the joint venture.

I was actively involved in most important decisions during the course of the investigation through frequent meetings with lead counsel, Terry Lubeck and his staff, and occasional meetings with outside counsel. I recommended filing the case that eventually was brought and participated in much of the negotiations that led to settlement of the litigation. The Court entered a consent order that in effect provided the relief sought by the government in the complaint.

a) The Complaint and Proposed Consent Decree were each filed on August 4, 1981.

b) Judge D. Green, D.D.C. presided.

c) major government co-counsel
P. Terry Lubeck - 724-7966
Joseph T. Melillo - 724-7984
Sanford M. Adler - 724-7540
Andrew D. Caverly - 724-7977
Antitrust Division
Washington, D.C.

Nicholas Clark - (currently) 466-1521
Assistant General Counsel
United Food & Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006

counsel for defendant
Daniel M. Gribbon - 662-6000
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C.

7. United States v. Siemens Corp. & G.D. Searle & Co., 490 F. Supp. 1130 (S.D.N.Y.) Aff'd, 621 F.2d 499 (2nd Cir. 1980)

This case involved a challenge by the United States under Section 7 of the Clayton Act of Siemens Corp.'s acquisition of the diagnostic imaging business of G.D. Searle & Co. The government alleged that the acquisition may tend substantially to lessen competition in the sale of certain nuclear medical imaging equipment. The case was brought while I was Assistant Chief of the Intellectual Property Section and the trial on the merits occurred while I was acting Chief. The district court rejected our request for a preliminary injunction and the Second Circuit affirmed 621 F.2d 499 (1980). The trial on the merits was conducted in 1981, but the district court has not yet written a decision. The case raised important antitrust issues including the proper scope of the antitrust "potential competition" doctrine.

I was involved minimally in the preliminary injunction trial, but thereafter was actively involved in the litigation. I was the primary author of the appellate brief to the Second Circuit and, through frequent direct contacts with lead trial counsel, Terry Lubeck, was intimately involved in most aspects of discovery, trial preparation and trial of the case. (Since my participation was in the capacity of supervisor, I had minimal interaction with opposing counsel.)

a) Appeal to Second Circuit of denial of grant of preliminary injunction - Argued April 1, 1980; Decided April 16, 1980.

Trial on the merits - November 1980 through January 1981

b) Appeal - United States Court of Appeals - Second Circuit; Circuit Judges Lumbard, Mansfield, Kearse.

Merits Trial - District Court Judge Vincent Broderick (S.D.N.Y.)

c) government counsel -
P. Terry Lubeck - 724-7966
Kenneth M. Frankel - 724-7971
Antitrust Division
Washington, D.C.
Kent Brown - (312) 353-7530
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Nicholas Clark - (currently) 466-1521
Assistant General Counsel
United Food & Commercial Workers
International Union
1775 K Street, N.W.
Washington, D.C. 20006

counsel for Siemens Corp. -
Bruce MacWhorter - (212) 483-1000
Werner Pollack - (212) 483-1000
Shearman & Sterling
53 Wall Street
New York, NY 10005

counsel for Searle -
Guy M. Struve - (212) 530-4000
Davis, Polk & Wardwell
One Chase Manhattan Plaza
New York, NY 10005

8. United States v. FMC Corp., 514 F. Supp. 1166 (E.D. Pa. 1981) rev'd, 717 F.2d 775 (3rd Cir. 1983)

This case involved a challenge to the enforceability of a patent based upon defendant FMC's failure to file an agreement relating to the patent with the United States Patent Office. The case raised issues of first impression concerning the proper interpretation of Section 135(c) of Title 35, including the government's standing to bring suit.

The investigation was initiated while I was in a supervisory position in the Intellectual Property Section. I supervised the pre-filing investigation and was primarily responsible for the recommendation to the Assistant Attorney General concerning which conduct should be challenged and which conduct should not. (The investigation was far broader than the case actually filed.) After my recommendation was accepted and the case brought, I had supervisory responsibility over the trial preparation, including drafting of briefs, selection of witnesses, and the establishment of trial strategy. I observed some of the trial, but was not at counsel's table. I participated in numerous negotiations with counsel both before and after the case was filed.

The district court found that the government had the authority under Section 135(c) to institute suit for failure to file an agreement with the Patent Office, but found that the agreement in question was not the type of agreement encompassed within Section 135(c). On appeal, the Court of Appeals for the Third Circuit interpreted Section 135(c) as not authorizing the government to institute such an enforcement suit.

a) Trial Dates - April 19, 1982 through May 12, 1982; Appeal Decided - September 13, 1983

b) District Court Judge - Edward N. Cahn
Circuit Court Judges - Adams, Higginbotham, Stapelton

c) government counsel -
Kurt Shaffert -724-8262
Kenneth M. Frankel - 724-7971
Antitrust Division
Washington, D.C.
Nicholas Clark - (currently) 466-1521
Assistant General Counsel
United Food & Commercial Workers International Union
1775 K Street, N.W.
Washington, D.C. 20006

counsel for FMC Corp.
H. Francis DeLone - (215) 972-3400
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
J.M. Fitzpatrick
Fitzpatrick, Cella, Harper & Scinto
277 Park Avenue
New York, NY 10172

9. United States v. Rohm & Haas Company, Civ. No. 86-3091, (D.D.C.)

This action was brought under Section 7 of the Clayton Act challenging Rohm & Haas' acquisition of certain of a competitors assets involved in the manufacture of ion exchange resins. The case raised important issues concerning the proper definition of relevant markets under Section 7.

The Antitrust Division began consideration of the bringing of a suit against Rohm & Haas when I served as Deputy Director of Operations, and the case was finally brought when I was serving as Deputy Assistant Attorney General. I had frequent meetings with the Division's staff and with counsel for Rohm & Haas. I was primarily responsible for deciding the scope of the complaint, including the relief sought, and the scope of the settlement. I engaged in frequent negotiations with opposing counsel.

a) The Complaint and a Proposed Consent Decree were filed simultaneously on November 10, 1986.

b) Judge Oliver Gasch

c) government counsel -
P. Terry Lubeck - 724-7966
Burney Boote - 724-7975
Robert Huber - 724-7540
Antitrust Division
Washington, D.C.

counsel for Rohm & Haas
Ky P. Ewing, Jr. - 639-6580
Vinson & Elkins
Willard Office Building, Suite 700
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

10. United States v. Merck & Co. Inc., 1980-81 Trade Cas. ¶ 63,682 (S.D. Cal. 1980)

The litigation, filed under Section 7 of the Clayton Act, alleged that Merck's acquisition of the assets of Alginate Industries may tend substantially to lessen competition in the sale of alginate in the United States. After a lengthy period of pre-trial discovery, a settlement of the litigation was reached in which Merck was forced to divest certain assets sufficient to create a new competitor in the alginate industry.

As a supervisor in the Intellectual Property Section, I had frequent meetings with the staff and was involved in all significant pretrial litigation decisions. I had occasional meetings with opposing counsel to resolve a variety of litigation issues.

a) The Complaint was filed on August 17, 1979; A proposed consent judgment was filed on September 2, 1980 and entered November 26, 1980.

b) Judge Howard B. Turrentine

c) government counsel -
P. Terry Lubeck - 724-7966
Sanford M. Adler - 724-7540
Antitrust Division
Washington, D.C.
Andrew L. Pringle -
(currently) (602) 285-5000
Mariscal, Weeks, McIntyre &
Friedlander, P.A.
201 West Coolidge Street
Phoenix, AZ 85013

counsel for Merck & Co. Inc. -
Robert J. Sisk - (212) 709-7000
Hughes, Hubbard & Reed
One Wall Street
New York, NY 10005
Calvin J. Collier - 626-6200
Peter M. Kreindler - 626-6200
Hughes, Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Answer: Since 1978, I have had significant responsibility in determining the Department of Justice's position on intellectual property issues, including the position taken in virtually every intellectual property-related Supreme Court case in which the U.S. appeared. Since 1984, I have had direct supervisory responsibility for virtually all merger investigation and litigation conducted by the Department of Justice Antitrust Division with the exception of some mergers in regulated industries. Since June 1986, I have had supervisory responsibility with respect to virtually every criminal investigation, indictment and litigation undertaken by the Antitrust Division.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

Answer: None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   Answer: I believe it is crucial that sitting judges avoid any possible appearance of impropriety. Therefore, if any significant potential conflict did arise, I would recuse myself from the matter.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   Answer: No

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Answer: No

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Answer: Not Applicable

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS (Thousands)	
Cash on hand and in banks	3
U.S. Government securities—add schedule	
Listed securities—add schedule	607
Unlisted securities—add schedule	
Accounts and notes receivable:	
Due from relatives and friends	
Due from others	
Doubtful	
Real estate owned—add schedule	610
Real estate mortgages receivable	
Autos and other personal property	17
Cash value—life insurance	
Other assets—itemize:	
COIN COLLECTION	5
IRA Accounts	30
Total assets	1272

LIABILITIES (Thousands)	
Notes payable to banks—secured	
Notes payable to banks—unsecured	
Notes payable to relatives	
Notes payable to others	
Accounts and bills due	
Unpaid income tax	*220
Other unpaid tax and interest	
Real estate mortgages payable—add schedule	266
Chattel mortgages and other liens payable	
Other debts—itemize:	
Stock margin accounts (See schedule	228
Total liabilities	714
Net worth	558
Total liabilities and net worth	1272

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	NO
On leases or contracts	NO
Legal Claims	NO
Provision for Federal Income Tax	[illegible]
Other special debt	[illegible]

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	STOCKS IN MARGIN Account
Are you defendant in any suits or legal actions?	NO
Have you ever taken bankruptcy?	NO

* My assets include stock and real property that have appreciated approximately $460,000 (stocks approximately $200,000 and real estate approximately $260,000.) If sold in 1987, an additional tax (federal and state) liability of approximately $220,000 would result. I presume that in assessing my net worth, you want a calculation that is net of taxes on such gains. Thus, I have included $220,000 as unpaid income tax.

SCHEDULES
(All Amounts Listed In Thousand Dollars)

ASSETS

A. Listed Securities (Common Stock)

Telex Corp.	43.5
Western Digital Corp.	117.6
Trion Corp.	144
Athey Corp.	102
Kenan Transport Corp.	114
Computer Pdts. Corp.	7.5
Texfi Corp.	16
Connor Homes	6.5
Circuit City Corp.	9.7
Louisiana Land	3.4
Computer Consoles	43.7

B. Real Estate Owned

3213 Military Road N.W., Wash. D.C. (residence)	185
6446 Guildar Street, Alexandria, VA	95
3023 Graham Road, Fairfax, VA	95
6554 Virginia Hills Avenue, Alexandria, VA	90
2327 Glendale Terrace, Alexandria, VA	70
2326 Fairview Terrace, Alexandria, VA	75

LIABILITIES

A. Real Estate Mortgages

United Mortgage Co.	17
Chevy Chase S&L	24
Gilldorn Mort. Co.	32
Midland Mort. Co.	49
Sovran Mort. Co.	30
Manufacturers Hanover	69
Perpetual American Bank	45

B. Stock Margin Accounts

Independence Securities	99
Olde & Co.	42
Dominick & Dominick	87

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Answer: While the United States Claims Court is an Article I court, I believe a Claims Court Judge's approach to decision-making should be identical to that of an Article III Judge. It is the responsibility of the Congress to establish basic social policy in our society. The responsibility of the judge is limited to resolving cases or controversies among parties to a lawsuit by applying the laws written by Congress to the facts presented in the litigation. Of course, when interpreting and applying the laws, a judge must do so with reference to the restrictions on Congress contained in the Constitution. Judicial activism, in the form of making broad policy determinations not required by the Constitution or by Congressional enactments, is beyond the role of the judicial branch.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

Answer: I believe it is crucial to democratic form of government, as well as morally correct, that all individuals be treated equally before the law. In all matters in which I have been involved as a professional in the Antitrust Division, I have always sought to apply that standard. I have treated all requests for action by the Division exclusively on the legal merits of the request without any regard for the identity of the requestor.

I have not done any pro bono work, per se. I am, however, dedicated to public service and continued to work in the public service despite far more lucrative opportunities in the private sector.

CONFIRMATION HEARING ON: H. ROBERT MAYER, LAYN R. PHILLIPS, AND ROYCE C. LAMBERTH

WEDNESDAY, MAY 13, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:45 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Howard Metzenbaum (acting chairman) presiding.

Also present: Senator Thurmond.

Staff present: Steven J. Metalitz, special counsel; Eddie Correia and Linda Greene, counsels to Senator Metzenbaum; Stephanie Hamlett, nominations clerk; Duke Short, minority chief investigator; Frank Klonoski, investigator.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. The Senate Committee on the Judiciary will commence our hearing on judicial nominations.

This afternoon the Judiciary Committee holds its fifth hearing in this Congress to consider nominations to the Federal courts. We will take testimony on three nominations: H. Robert Mayer, who is now a Judge of the U.S. Claims Court, has been nominated to be U.S. Circuit Judge for the Federal Circuit; Layn R. Phillips has been nominated to the United States District Court for the Western District of Oklahoma; Royce C. Lamberth has been nominated to the U.S. District Court for the District of Columbia.

Before we turn to Senators, let me note for the record that each nominee before the committee today has completed an extensive questionnaire on his qualifications, experience and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing.

We will also keep the record open for a limited time for follow-up questions of the nominees and for additional questions that may be submitted by members of the Committee who are unable to be present this afternoon.

Finally, we will include in the record the full introductory statements of home State Senators and the full written statements of all witnesses.

We will hear first from Senators who wish to introduce nominees to the Committee. Senator David Boren of Oklahoma is here to introduce Mr. Layn Phillips. Senator Don Nickles is also here to introduce Mr. Phillips. And Senator Trible and Senator Warner

wanted to be present, but were unable to be here. Senator Trible has submitted statements on behalf of both Mr. Lamberth and Mr. Mayer. These statements will be included in the record of this hearing, along with Senator Warner's statement on behalf of Mr. Lamberth.

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman and members of the Committee, it is a pleasure to come before you today to introduce Mr. Royce C. Lamberth to the Senate Judiciary Committee for his confirmation as a Judge for the United States District Court, District of Columbia.

Mr. Lamberth received his baccalaureate and law degrees in the state of Texas, and is presently a resident of Alexandria, Virginia.

Mr. Lamberth is a distinguished member of the Bar, with extensive litigation experience ranging from criminal trials to extremely sophisticated cases involving Armed Services intelligence operations.

I note with interest that Mr. Lamberth was stationed in Vietnam with the Army Judge Advocate General's Corps during my tenure as Secretary of the Navy.

Upon returning from Vietnam, Mr. Lamberth joined the Army Litigation Division of the Judge Advocate General's Office at the Pentagon.

He then moved to the U.S. Attorney's Office in the District of Colombia as an Assistant U.S. Attorney, and in 1977 became Assistant Chief of the Civil Division in the U.S. Attorney's Office.

Mr. Lamberth has served in the U.S. Attorney's Office as Chief of the Civil Division since 1978.

Mr. Lamberth has extensive trial experience with administrative, commercial, legislative, criminal and constitutional law.

I am confident that Royce Lamberth will be an excellent addition to the federal bench, and I am pleased to commend him to you today.

PREPARED STATEMENT BY SENATOR PAUL TRIBLE

Mr. Chairman, I am pleased to present to the committee Judge H. Robert Mayer.

Judge Mayer will bring to the Federal appellate bench a wealth of experience and the personal attributes of an excellent jurist: intellectual rigor, a judicial temperament and a deep appreciation of the American legal system.

He not only has an outstanding record as a trial lawyer in private practice but has served with distinction as a United States Claims Court judge, as special counsel to the merit systems protection board, and as special assistant to the Chief Justice of the U.S. Supreme Court.

Judge Mayer obtained his undergraduate degree from the United States Military Academy and his law degree from the college of William and Mary where he graducated first in his class. He has served with distinction in the United States Army and is currently a retired lieutenant colonel in the Army Reserve. He has published and lectured in the field of law and is a proven leader in his field.

Mr. Chairman, in every respect Judge Mayer is eminently qualified to serve on the court of appeals for the Federal circuit, and I hope that your committee will report his nomination promptly to the full Senate.

PREPARED STATEMENT BY SENATOR PAUL TRIBLE

Mr. Chairman, I'm pleased to present to the committee Mr. Royce Lamberth, of Alexandria, Virginia.

Mr. Lamberth is an outstanding choice to serve as U.S. district judge for the District of Columbia. He will bring a wealth of trial experience to the Federal bench in the Nation's Capital.

Mr. Lamberth has more than a decade of experience in the the U.S. attorney's office in Washington, DC. He began as an assistant U.S. attorney in 1974, and rose quickly to become chief of the civil division in that office.

This experience will serve him well during his tenure as U.S. district judge. I am confident that Mr. Lamberth will be an outstanding jurist, and I urge his confirmation by this committee.

Senator **Metzenbaum**. Senator Boren, we will be happy to hear from you, sir.

Senator **Boren**. Thank you very much, Mr. Chairman.

I would like to defer first to my colleague Senator Nickles, and then I will add my comments after Senator Nickles has made his introductory comments.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA ON BEHALF OF LAYN R. PHILLIPS

Senator **Nickles**. Mr. Chairman, thank you, and to my friend and colleague Senator Boren, thank you as well.

It is certainly a pleasure, Mr. Chairman, for me on behalf of the State of Oklahoma to highly recommend Layn Phillips as our nominee and the President's nominee to be a Federal Judge for the Western District of Oklahoma.

Mr. Chairman, you may or may not remember, but a few years ago, in 1983-84, Senator Boren and I presented Mr. Phillips before this Committee for U.S. Attorney for the Northern District of Oklahoma. We have had the three or four years since that time to witness the caliber of office that he has put together for the Northern District, and let me say that it has been an outstanding U.S. Attorney's Office. He has conducted that office professionally, with a great deal of pride, and I think the entire State is beholden, and quite frankly, very thankful for the expertise and the outstanding job that he has provided for the government, for the court, for the Northern District of the State of Oklahoma.

He has done an outstanding job as U.S. Attorney, and certainly he will be missed in that role, but I think the job he has done certainly qualifies him, and we are proud to have him up for consideration for the position of Federal Judge for the Western District.

Mr. Phillips has a lot of experience. He has practiced, as I mentioned, a few years as U.S. Attorney in Oklahoma. He has also practiced as Assistant U.S. Attorney in the Los Angeles U.S. Attorney's Office. Before that, he worked in Washington, DC, working with the Federal Trade Commission.

So he has, I think, an outstanding, very distinguished career as a prosecutor, as a person who has worked before the Federal courts. His experience in litigation is extensive, and it has also been exceptional. He has certainly done an outstanding job.

He has practiced before Federal courts in Washington, DC, in California, in Colorado, in Florida, as well as in Oklahoma.

In addition to that he brings to the U.S. District Court the benefits of teaching others in trial practice, both as an adjunct professor at the University of Tulsa, and also at the Attorney General's Advocacy Institute here in Washington, DC. He has demonstrated his ability to meet the high standards that are appropriate to District Court Judges. He has garnered wide acclaim for his achievements in the Northern District of Oklahoma, and quite truthfully, it is difficult to seek promotion of an outstanding U.S. Attorney to the Federal Bench when the need for good Federal prosecutors has never been greater. So Layn Phillips, in my opinion, Mr. Chairman, certainly deserves it. He has worked hard, and I am sure that he will certainly excel as a Federal Judge.

So it is without any hesitation or reservation whatsoever that I strongly recommend Mr. Phillips to this Committee and, to the President of the United States, for the position of U.S. District Judge in the Western District of Oklahoma.

Senator **METZENBAUM**. I appreciate your comments, Senator Nickles.

Senator **NICKLES**. Thank you, Mr. Chairman.

[Statement follows:]

PREPARED STATEMENT OF SENATOR DON NICKLES

Mr. Chairman: Thank you for this opportunity to speak in support of the nomination of Layn R. Phillips for the position of United States District Judge for the Western District of Oklahoma. I am certainly pleased to urge your favorable consideration of his nomination.

Mr. Phillips is currently serving as the United States Attorney for the Northern District of Oklahoma, where he has distinguished himself in the prosecution of complex criminal fraud cases. He has been our U.S. Attorney there since 1984. Prior to that, he was an assistant U.S. Attorney in Los Angeles from 1980 through 1983. From 1977 to 1980, he served as a trial attorney with the Federal Trade Commission here in Washington. Throughout his ten years of legal experience, he has repeatedly demonstrated his abilities to master complicated evidentiary presentations and fact patterns in both criminal and civil cases.

To Oklahomans, Mr. Phillips' distinction in his role as a United States Attorney is no surprise. A native of Oklahoma City, Mr. Phillips consistently distinguished himself in both academic and athletic endeavors at the University of Tulsa.

Of particular relevance to his nomination to the Federal Bench is the fact that most of his extensive litigation experience has been before federal courts. Moreover, Mr. Phillips has practiced before federal courts in Washington, D.C., California, Colorado and Florida as well as Oklahoma; and has extensive experience in writing and arguing appellate briefs.

Finally, Mr. Phillips would bring the U.S. District Court the benefits of teaching others in trial practice, both as an adjunct professor at the University of Tulsa and at the Attorney General's Advocacy Institute here in Washington.

Layn Phillips, has demonstrated his ability to meet the high standards that are appropriate to district court judges. He has garnered wide acclaim for his achievements in the Northern District of Oklahoma. Quite truthfully, it is difficult to seek the promotion of an outstanding U.S. attorney to the federal bench when the need for good federal prosecutors has never been greater. But Layn deserves it. He has worked hard and I am sure he will continue to excel as a federal judge.

I urge my colleagues to approve the nomination of Mr. Phillips for the position of United States District Judge for the Western District of Oklahoma.

Senator **METZENBAUM**. Senator Boren.

STATEMENT OF HON. DAVID L. BOREN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA ON BEHALF OF LAYN R. PHILLIPS

Senator **BOREN**. Thank you, Mr. Chairman.

I am very proud to associate myself with the remarks that have just been made by my colleague Senator Nickles.

Mr. Phillips enjoys the bipartisan support of the people of Oklahoma, and I am very pleased to join in the recommendation to this committee that he be confirmed for this very important post.

As Senator Nickles has indicated, he has a wide range of experience. He has had an exceptionally fine record as U.S. Attorney in Tulsa, with broad experience, on a special assignment as a special Assistant U.S. Attorney in Miami, as well as experience in Los Angeles. He has been public-spirited, as Senator Nickles said, in addition to his duties in the U.S. Attorney's Office. He has been willing to devote extra time to serve as an adjunct professor at the University of Tulsa College of Law. He has a very fine academic background. He has a B.A. in economics from the University of Tulsa, his law degree from the University of Tulsa, and an L.L.M. Degree from Georgetown University Law School.

He is 35 years of age, Mr. Chairman. There are some who might ask is that old enough to be a Federal Judge. I have gone through a period of time when I used to use as my political slogan, "Give a young man a chance." Of course, I have had to adjust over the years. Now I talk about "Maturity and experience counts."

But I would say that in his 35 years, he has an extraordinary background. Senator Nickles and I naturally think that his age should be a positive factor rather than a negative. He is two years older than I was when I became Governor of Oklahoma, and he is four years older than Senator Nickles was when he became a United States Senator. So, needless to say, we think that his age should not be a disqualifying factor—in fact, I think we are very fortunate indeed to have a person of his vigor and his potential service on the Bench to come to service this early in his life. And again, as I say, he has packed a wealth of experience, of academic training, professional involvement with the highest possible standards into the 35 years that he has lived. He has a very unique background and he enjoys broad support in our State.

I would like to mention, Mr. Chairman, that recently I received a letter, and I think it has been shared with the Committee, signed by all four of the judges in the Western District in Oklahoma. I would point out that this is a bipartisan group appointed by three different Presidents, these four Federal District Judges. They indicate that our needs are critical in the Western District in Oklahoma, even when all five positions, with the confirmation which we hope to see of Mr. Phillips, even when all five judgeships are filled and functioning, the Western District of Oklahoma will still have the second-highest weighted caseload per judge of any Federal Court District in the United States. And so they are appealing for prompt action on this nomination because of the very heavy burdens that we are facing, of course in part, related to the economic problems that we are having in our State at this time.

Senator **Metzenbaum**. Not related to the fact that there is more crime or anything in Oklahoma.

Senator **Boren**. Oh, certainly not—only from people passing through from time to time that we have had come through. But we do have a very strong need to have Mr. Phillips on the Bench and to have that full contingent of judges functioning as soon as possible.

Mr. Chairman, I appreciate your allowing both Senator Nickles and myself to be here to express our support for this nominee, and I am very proud to do so.

Senator **Metzenbaum**. We are certainly very happy to hear from you and Senator Nickles both in connection with Mr. Phillips.

And I think, Senator Nickles, you wanted to act as a surrogate for Senator Warner in connection with two of the nominees today?

Senator **Nickles**. Mr. Chairman, if that would be appropriate, I would appreciate it. I know Senator Warner and Senator Trible, are both tied up on the Floor, and if it would be appropriate, I would like to submit their statements on behalf of Royce Lamberth to be U.S. District Judge for the State of Virginia. I would appreciate it if you would put those statements in the record.

Senator **Metzenbaum**. Without objection, it will be included in the record as if delivered by Senator Warner.

Senator **Nickles**. Thank you. I have a statement from Senator Trible as well.

Senator **Metzenbaum**. Thank you very much, and Senator Trible's statement will be included in the record.

Senator **Nickles**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. I would like to ask Mr. Robert Mayer, Mr. Layn Phillips, and Mr. Royce Lamberth if they would come forward, stand and take the oath at this time.

Will the testimony you give in this proceeding be the truth, the whole truth, and nothing but the truth?

Judge **Mayer**. It will.

Mr. **Phillips**. It will.

Mr. **Lamberth**. It will.

Senator **Metzenbaum**. Thank you very much.

We will now take up consideration of the nomination of H. Robert Mayer, of Alexandria, to be U.S. Circuit Judge for the Federal Circuit.

TESTIMONY OF HON. H. ROBERT MAYER, OF ALEXANDRIA, VA, NOMINATED TO BE U.S. CIRCUIT JUDGE FOR THE FEDERAL CIRCUIT

Senator **Metzenbaum**. Mr. Mayer, we are very happy to have you introduce the members of your family if they are with you here today.

Judge **Mayer**. Thank you, Mr. Chairman.

With me today is my wife, Mary Anne, and my daughters Anne and Rebecca, sitting in the second row. Thank you for this opportunity, sir.

Senator **Metzenbaum**. I just want to ask your daughters, do you think your father ought to be confirmed for this position as U.S. Judge?

[In unison.]

Anne Mayer. Yes.

Rebecca Mayer. Yes.

Senator **Metzenbaum**. That is very persuasive. [Laughter.]

It is my understanding that Mr. Thomas M. Devine, Director of the Government Accountability Project, wishes to be heard in connection with this nomination. I would just ask you to sit at the table, please.

Mr. **Devine**. Mr. Chairman, Mark Roth, of the American Federation of Government Employees, is appearing with me to present testimony.

Senator **Metzenbaum**. Mr. Mayer, you served for almost two years as Deputy Special Counsel of the Merit Systems Protection Board and for a brief period as the Acting Special Counsel. The court to which you have been nominated has exclusive jurisdictions of appeals from decisions of the Merit Systems Protection Board.

First of all I would like to ask you during what period of time did you serve as their Deputy Special Counsel?

Judge **Mayer**. It was from June of 1981 until December of 1982, sir.

Senator **Metzenbaum**. And what did you learn during your tenure with the Office of Special Counsel that will be most valuable to you as a Judge in the Federal Circuit?

Judge **Mayer**. Well, Mr. Chairman, during that time the most pertinent, probably, education I got was about the intricacies of Title 5 of the United States Code, pertaining to personnel actions in the government, the regulations and the procedures governing the various personnel actions of the Federal government.

The Special Counsel cases that would ultimately go to a court do not specially go to the Court of Appeals for the Federal Circuit. So to that extent, the education I received is not going to be particularly pertinent here, except that a lot of the personnel actions that the Special Counsel's Office dealt with are the same ones that Federal employees would present to the Merit Systems Protection Board, and which ultimately can be appealed to the Court of Appeals for the Federal Circuit.

Senator **Metzenbaum**. Do you feel that that experience could be helpful to the court as a whole, to other members of the court?

Judge **Mayer**. I believe, Mr. Chairman, that the experiences that any judge brings to a multi-judge court can be of benefit to all of us, to all of the judges.

Of course, when sitting on an appeal from the Merit Systems Protection Board, in this context, I would be there only one of three, normally, judges sitting on a panel. But to the extent I bring some experience that may not be there or may not be there in the same context as I earned my experience, I should think it would be beneficial, as would any other experiences that I or other judges might bring to the court.

Senator **Metzenbaum**. I am going to call the other nominees to the table first, before we go into hearing from the witnesses in connection with the several nominees.

Mr. Layn Phillips, would you be good enough to come back to the table, sir?

I will excuse you for the time being, Mr. Mayer, but I hope you will remain in the room.

Judge **Mayer**. All right, sir.

United States Claims Court
717 Madison Place, N.W.
Washington, DC 20005

May 19, 1987

RECEIVED MAY 20 1987

Dear Mr. Chairman:

Attached are my responses to the questions you sent me on May 14, 1987, after the hearing on my nomination for the Court of Appeals for the Federal Circuit. I hope they are satisfactory. Thank you for your consideration, and for your kindness to my family at the hearing.

Sincerely,

H. Robert Mayer

Honorable Howard M. Metzenbaum
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Enclosure

cc: Honorable Strom Thurmond
Honorable John R. Bolton

I: PATENT AND TECHNOLOGY BACKGROUND

The testimony of the American Intellectual Property Law Association raises two related points about the background of nominees to the Federal Circuit. First, the AIPLA argues that the Federal Circuit will benefit from having nominees with patent law background. They also note that judges without an educational background in the physical sciences are at a disadvantage in cases requiring the application of the patent law to complex technology.

Do you have patent law experience?

Answer: Yes, the United States Claims Court has jurisdiction over certain patent cases under the provisions of 28 U.S.C. § 1498. During my tenure on the court I have entered final judgment in two of these cases and have presided over six others.

Please describe your background in the physical sciences, and how you think this background may assist you in deciding patent cases before the Federal Circuit.

Answer: I received a sound and comprehensive education in the physical sciences at the United States Military Academy. When I attended West Point, the curriculum was prescribed and required successful study of science, engineering and mathematics, which made up approximately 60% of the curriculum. Accordingly, I studied mathematics through calculus and differential equations; general physics and chemistry; measurements and graphics; thermodynamics; engineering mechanics; electrical engineering, including direct and alternating current circuits and machinery; electronics and communications; atomic and nuclear physics; fluid mechanics; mechanics of materials; structural analysis; ballistics engineering; propulsion engineering; and structural design. During my military career, I had an assignment as an electronics engineer in the Army's research and development program dealing with laser technology, computers, microwave telemetry and associated subjects.

I believe this background will assist me in deciding patent cases before the Federal Circuit because it will enable me to understand the technology underlying the facts of the cases. In my view, any judge may be expected to understand patent law, just as any other substantive area of the law. But a sound education in science and engineering will permit a more thorough understanding of the underlying facts of the cases and assist in determining the proper application of the law to those facts.

II: MEMBERSHIP IN WEST POINT ALUMNI GROUPS

You are a member of two associations of West Point graduates. I assume that for most of their history, these groups have been all-male in membership. Now that women are admitted to West Point, are these groups open to female graduates of West Point on the same terms as male graduates?

Answer: Yes, both the United States Military Academy Association of Graduates and the West Point Society of the District of Columbia are open to female graduates of West Point on the same terms as male graduates.

III: TRIAL EXPERIENCE

You have had a great deal of experience as a trial lawyer in military and civilian courts, and, of course, you have been a trial judge for the last four and one-half years. How do you think this extensive trial experience has prepared you for service on the Court of Appeals for the Federal Circuit?

Answer: My experience as a trial lawyer and trial judge has educated me to the stresses and pressures, the strengths and limits, that attend the litigation process. As an appellate judge I would be sensitive to those attributes in reviewing the records which come before the court when the "battle" is over. I would expect appellate decisions reached with a full appreciation of how the case evolved to that penultimate point would be more realistic and commonsensical than if they were decided on a purely theoretical basis without considering the human aspects that went into the advocates' assembly and presentation of the case, and the trial court's decision making process.

IV: BAR ASSOCIATION SCREENING

Did you receive any advice or direction from the Justice Department as to how you should respond to requests from bar associations, other than the ABA, to interview you or to provide other information in order to evaluate your nomination?

Answer: Yes. The guidance I received from the Justice Department was that I was to cooperate fully with the American Bar Association Standing Committee on Federal Judiciary because of its quasi-official role in advising the President and the Senate about the professional qualifications of prospective nominees for judicial office. I was advised that I was not expected to respond to requests for interviews or other information from other bar associations during this process.

Did you meet with representatives of the Federal Circuit Bar Association and the Customs and International Trade Bar Association to discuss your candidacy? Did you have similar meetings with representatives of any other bar groups? If so, which groups? Did you find the process of meeting with these groups, or any other activities which they undertook to evaluate your candidacy, burdensome or offensive in any way?

Answer: I met with representatives of the judicial selection committees of the Federal Circuit Bar Association, the Customs and International Trade Bar Association, and the International Trade Commission Trial Lawyers Association at their requests.

I did not find the process of meeting with these groups burdensome or offensive, and I believe they conducted themselves appropriately under the circumstances. The only discomfort I felt was when I discovered that one member of one of these committees was an attorney who had an active case before me. I advised the committee chairman of this fact and stated that under the circumstances I believed it would be inappropriate for me to meet with that individual or to be advised in any way of his views on my qualifications. The chairman agreed and I did not meet with that lawyer or learn of his views, if indeed he even participated in the process.

V: ACTIVITIES AT OFFICE OF SPECIAL COUNSEL

Questions were raised at the hearing concerning your involvement in alleged fund transfers between the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC), or instances in which funds appropriated for OSC were used to purchase equipment for, or to defray the cost of operation of, MSPB, during your tenure at OSC in 1981-82.

Do you recall any such transactions? If so, please describe them briefly, including their purpose and the amounts involved. Please describe your involvement in these transactions.

Answer: OSC and MSPB were closely allied administratively during my tenure in 1981-82 and shared some administrative functions. Because of its small size OSC relied on other entities for some support activities because it was more economical than duplicating them within the agency. I do not recall any transactions in which funds appropriated for OSC were used to purchase equipment for, or to defray the cost of operation of, MSPB during my tenure. But I do recollect discussion at that time about payments to MSPB and from MSPB to OSC for services one entity performed for the other. I do not recall what they were, or how much money was involved. However, the OSC director of administration, William Caldwell, whose staff administered the budget at that time, testified at a hearing on the nomination of Judge Alex Kozinski to the Court of Appeals for the Ninth Circuit that the payments were for "staff time involved in typing up vouchers, processing vouchers, doing warehousing, furnishing warehouse space, furnishing rental space to us." That sounds vaguely familiar. I believe OSC may have charged MSPB for operating its case-tracking system on the OSC computer, although it may be that this was only a matter under discussion. I believe OSC also paid the Office of Personnel Management to administer the payroll for its employees, and made similar payments for other services from other governmental entities. Again, I have no recollection of the details or how much money was involved. Furthermore, I have no knowledge of how MSPB may have spent any funds it may have received from OSC.

My involvement with the budget was one of general oversight in conjunction with or on behalf of the Special Counsel. From time to time I was briefed on the budget situation of OSC, the status of appropriations bills before Congress, the fate of OSC's budget requests at the Office of Management and Budget, and the like. I communicated with OMB and responded to congressional inquiries about budget matters either in person or in writing with the assistance and input of OSC administrative personnel. When the budget crisis was at its height, I was assigned by the Special Counsel to approve the payment of discretionary expenses, such as for travel.

To the best of your recollection, were any questions raised about the propriety or legality of such transactions? If so, who raised these concerns, and how were they resolved?

Answer: No one raised any questions to me or in my presence during my tenure at OSC about the propriety or legality of any of the transactions mentioned in the preceding answer.

Do you recall any discussion at the time of these transactions of a prior history of similar transactions, or of prior transactions in which funds appropriated for MSPB were used to defray the costs of operation of OSC? If so, please give your recollection of these discussions concerning prior transactions.

Answer: The only such discussions I recall pertained to a period before I arrived at OSC. If memory serves, OSC had exhausted its funding because of budget cuts and some of the OSC employees, or perhaps all of them, were then detailed for duty to MSPB to prevent them from being furloughed without pay.

It has been suggested that the relationship between the MSPB and OSC is comparable to the relationship between a tribunal and the office that prosecutes cases before the tribunal. In your view, is this an accurate analogy?

Answer: I believe this is an accurate analogy.

Did you then, or do you now, perceive any possibility that the use of funds appropriated for OSC to defray costs incurred by MSPB might create any appearance of impropriety? If so, did you raise any objections or express any reservations at any time about the propriety of these transactions? If so, were your concerns satisfied? How?

Answer: I am not aware that funds appropriated for OSC were used to defray costs incurred by MSPB. To the best of my recollection, funds transferred between the two entities were for services rendered as discussed above. I do not believe that an objective view of the transactions with full knowledge of the facts would cause one to question the propriety of this cooperation. OSC and MSPB were small agencies located in adjacent space in a privately owned building, and not in close proximity to other government agencies. The sharing of expenses or the exchange of services at the administrative level was innocuous and did not influence the adjudicatory role of MSPB or the litigation role of OSC. This limited cooperation was merely an effort to efficiently and cost effectively administer the office. By way of analogy, GSA provides many services to federal courts and is a frequent litigant before those courts. I am aware of no challenge to the propriety of this arrangement.

H. Robert Mayer
H. ROBERT MAYER

Subscribed and sworn to before me this 19th day of May 1987.

Juanita C. Dooley
Notary Public

My Commission expires February 14, 1988.

TESTIMONY OF LAYN R. PHILLIPS, OF TULSA, OK, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA

Senator METZENBAUM. Mr. Phillips, are any members of your family with you?

Mr. PHILLIPS. Yes. My wife, Kathryn, is here today.

Senator METZENBAUM. Kathryn, you are entitled to vote, also. Do you have a vote? Do you think we should confirm him? I do not want to allow those two young ladies and not give you an opportunity to vote.

Mrs. PHILLIPS. My vote is yes.

Senator METZENBAUM. Mr. Phillips, you served as U.S. Attorney for the Northern District of Oklahoma for nearly three and a half years. What would you say have been your most important accomplishments?

Mr. PHILLIPS. Mr. Chairman, I think our most important accomplishments have been in the fight against major narcotics traffickers who have operated or attempted to operate in the Northern District of Oklahoma. My District since 1983 has led the Nation in the filing of charges under the Continuing Criminal Enterprise Statute which Congress enacted to severely deal with major organized narcotics rings.

That record of prosecutions and the forfeitures obtained as a result of those prosecutions, in my opinion, is the most outstanding accomplishment of our District in the last three years.

Senator METZENBAUM. In 1986, 92 percent of the cases filed in the Western District of Oklahoma were civil cases. What civil litigation experience do you have?

Mr. PHILLIPS. Senator, I am glad you asked that because, while it is true that my recent experience has been in the area of criminal law, the fact of the matter is that I have spent more days in court on civil matters than criminal matters.

In 1978, 1979 and 1980, I served as the government's counsel on two merger challenges under Section 7 of the Clayton Act. The first such case involved TENNECO's acquisition of Monroe Auto Equipment Company, and the second case involved Beatrice Food's acquisition of Tropicana Orange Juice Company.

The TENNECO trial lasted 13 months; the Beatrice trial lasted 6 months. During the course of that litigation, I was exposed to virtually all facets of civil litigation. Specifically, I undertook the testimony of industry witnesses and expert witnesses in the area of economics, finance and accounting. I took numerous depositions. I have responded to and issued literally thousands of interrogatories and requests for admission.

Also I think it is important to note that in my current capacity, I supervise the Civil Division of the United States Attorney's Office in the Northern District of Oklahoma. In that capacity, I read every pleading that goes out of the office, and I read every piece of correspondence that goes out of the office.

Senator METZENBAUM. As you know, a majority of the ABA Committee rated you qualified, but a minority thought you were unqualified. It is my understanding that this minority felt that you should have at least 12 years' experience before becoming a Federal Judge. Would you care to comment on that?

Mr. **Phillips**. Yes, Senator. The rating in this case, of course, is that a substantial majority of the American Bar Association found me to be qualified. I found that in becoming familiar with this process that the ABA employs what is known as a 12-year rule. And in that regard, I was informed by a member of the ABA Circuit Committee that there was one and perhaps two members of the American Bar Association Committee that strictly adhered to that rule.

At the time of my nomination, of course, I was only 9 years out of law school.

Senator **Metzenbaum**. Mr. Phillips, I am going to take a recess. I have a very urgent telephone call. We will stand in recess for probably 5 or 10 minutes and we will be back with you shortly—it has nothing at all to do with this hearing.

Mr. **Phillips**. Certainly.

[Recess.]

Senator **Metzenbaum**. The Chair apologizes for the interruption, but no one was here to preside in my behalf, and I had no choice but to do what I did.

The committee's investigators, Mr. Phillips, have talked to several experienced criminal defense lawyers about you. Everyone has praised your skill and effectiveness as a prosecutor. In fact, some have said you are the best prosecutor they have ever faced. But some have expressed reservations about your becoming a Federal Judge. The gist of the concern is that you are such an aggressive prosecutor that you may find it hard to be an impartial judge.

I myself would sort of comment and say you are damned if you do, and you are damned if you don't. If you were not a good prosecutor, then you would be criticized for that; if you were a good prosecutor, you are criticized because you might be too prosecutorial. But you make your own response.

Mr. **Phillips**. Senator, in every criminal case I try, I tell the jury that the Government always wins in criminal cases, that the Government always wins when justice is done, when the innocent are set free and when the guilty are convicted fairly, with all due deference to constitutional rights.

I believe in that principle. In my current position, I have been a strong advocate for the Government. As a United States District Judge, my role will change; I will be required to oversee the advocacy of other attorneys. The oaths are very similar. The oath is to support, protect and defend the Constitution. I am confident that I will be able to carry out that oath.

Senator **Metzenbaum**. There is some concern that you lack compassion. Would you care to address yourself to that?

Mr. **Phillips**. As a United States Attorney, I have taken tough stances in drug cases, white collar cases, and official corruption cases. I believe I also have the other pertinent quality traits to be a successful United States District Judge, including compassion.

The types of cases that we prosecute in the Northern District of Oklahoma require aggressive prosecution, and I have devoted myself to that task. There are other qualities that I believe are necessary to be a Federal Judge, and I think I have those qualities and that I will demonstrate those qualities if this committee gives me the opportunity.

Senator **Metzenbaum**. Now, you successfully prosecuted State Senator Finis Smith on charges of mail and tax fraud. During the sentencing proceedings, a number of public officials wrote to the court, urging leniency for Senator Smith. When you submitted your views on sentencing to the court, you included a list of these officials. This document became public, and there was a great deal of press attention paid to the controversy.

Is it proper for the prosecutor to release the names to the public of those public officials who advocated leniency or compassion in the sentencing—and in answering, I must tell you that the Chair within the last several hours was asked to write to a jurist in Cleveland in a case, and I had some mixed feelings about it. I have not written, and I do not know if I am going to write. But I would like to get your views on it. Maybe it will be not only helpful in this hearing as far as your confirmation is concerned, but will open some vistas to the Senator who is conducting the hearing.

Mr. **Phillips**. Thank you, Senator. I can respond to that.

My view is that the Federal Rules of Criminal Procedure provide the Government with an opportunity to respond to all materials that are submitted in the form of sentencing memoranda or a defendant's version of the offense under Rule 32. In this particular case, these letters were attached as exhibits by the defense attorneys to documents that were lodged with the court. Under our local rules of practice and under Rule 32 of the Rules of Procedure, the court had them delivered to my office for comment and review. In reviewing those materials, I noticed that a number of public officials suggested that the Smiths should receive leniency in the form of probation or community service rather than incarceration.

The case in question involved 34 convictions of the Smiths on mail fraud, tax fraud, and foreign bank account fraud involving the laundering of tag agent monies through foreign bank accounts.

I took the position that there was not two systems of justice, one for the high and the mighty and one for everyone else, and I further took the position that the requests for leniency in this case would further shatter the public's confidence in our system of State government.

Quite simply, I did what I felt I had an obligation to do—to respond to requests for leniency which I felt were misplaced. I did that. While the authors of those letters had the right to submit such letters to the court, I had the right, and in this case I believe, the duty, to respond. I also believe that the Government in official corruption cases, as in any criminal case, should make its sentencing views a matter of public record. Our system is based on the notion that criminal proceedings are public proceedings and that the public has a right to know the Government's views on sentencing in official corruption matters.

Those were the reasons why I took the position that I did.

Senator **Metzenbaum**. Senator Thurmond, do you have any questions?

Senator **Thurmond**. Thank you very much.

Mr. Phillips, I want to congratulate you upon your appointment by the President. You have the endorsement of both Senators from your State, I believe, Senator Boren and Senator Nickles.

Now, as I understand it, the letters written on behalf of the Smiths would not have come to light if they had not been attached to the defendant's version of the offense which they lodged with the court. Is that correct?

Mr. PHILLIPS. That is correct, Senator.

Senator THURMOND. Now, is it standard practice for the Government to comment on the defendant's version of the offense?

Mr. PHILLIPS. Yes, it is, Senator, a standard practice for the Government to comment upon and object to the defendant's version of the offense in Federal criminal matters. That is a practice that I have followed in the major criminal cases, in the majority of criminal cases, that I have handled.

Senator THURMOND. Now, as I understand it, the defendants did not provide you with a courtesy copy of their sentencing memorandum. Is that unusual?

Mr. PHILLIPS. That is unusual, Senator. Normally, as in this case, we file as representatives of the Government all of our documents on the public record. In this particular case, the sentencing memorandum that was lodged by the defendants was lodged on an ex parte basis, and we were not provided with a copy of that.

Senator THURMOND. Mr. Phillips, did you object to all requests for leniency made by all of the public officials?

Mr. PHILLIPS. Yes, Senator, I did. The officials fell into three groups—Democrats, Republicans, and members of the State Judiciary. I objected to all of the leniency requests.

Senator THURMOND. And your pleadings were filed on the public record, I believe. Do you believe the public has a right to know the Government's views on sentencing in public corruption cases?

Mr. PHILLIPS. I certainly do, Senator. That is my strong belief.

Senator THURMOND. What was the public's response to the request for leniency?

Mr. PHILLIPS. The public's response, Senator, was overwhelmingly in support of the position taken by the Government, namely, that this was not an appropriate case for probation or community service.

Senator THURMOND. You have served as United States Attorney since 1983, I believe.

Mr. PHILLIPS. That is correct, Senator. I was appointed unanimously by the District Court judges in the Northern District of Oklahoma as Interim U.S. Attorney in December of 1983 and received the President's appointment in 1984.

Senator THURMOND. You were appointed as a court appointment, originally?

Mr. PHILLIPS. That is correct, sir.

Senator THURMOND. And then Presidentially appointed from 1984 on.

Mr. PHILLIPS. That is correct.

Senator THURMOND. I think those are all the questions I have, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Thurmond.

Senator Thurmond, we had Mr. Mayer up previously. I had inquired of him. I do not intend to call him back unless you have some questions for him.

Senator **Thurmond**. Well, have you raised any objection to him, or is he clear, as far as you know, Senator?

Senator **Metzenbaum**. No, no objection.

Senator **Thurmond**. Well, if you have not raised any objection to him, I will not call him back.

Senator **Metzenbaum**. I get the philosophy around here, Senator Thurmond. I get the point.

Senator **Thurmond**. Mr. Mayer, I see you sitting back there–Judge Mayer, I believe.

I want to congratulate you upon your appointment. I believe you have the endorsement of both your Senators, too, Senator Warner and Senator Trible.

Judge **Mayer**. Yes, Senator.

Senator **Thurmond**. And I believe Mr. Phillips has the endorsement of Senator Boren and Senator Nickles; is that correct?

Mr. **Phillips**. That is correct, Senator.

Senator **Thurmond**. I just want the record to show that.

I want to ask Mr. Mayer one question, if he will just come up to the table.

Mr. **Phillips**. May I be excused, Mr. Chairman?

Senator **Thurmond**. Yes, you are excused.

Mr. Mayer, you are on the United States Claims Court now, aren't you?

Judge **Mayer**. Yes, Senator, I am.

Senator **Thurmond**. And you have been nominated to be U.S. Circuit Judge for the Federal Circuit.

Judge **Mayer**. Yes, Senator.

Senator **Thurmond**. You do not see any trouble in transferring from one court to the other, do you?

Judge **Mayer**. No, I would not anticipate any problems, Senator Thurmond. To some extent, the work of that court coincides with the work we are doing in the Claims Court at the trial level. To the extent it is different subject matter, I believe I have the foundation with diligence to be able to address those cases and to handle them fairly, impartially, and in accordance with my oath.

I have had considerable experience at the appellate level already as a law clerk to Judge Butzner on the Court of Appeals for the Fourth Circuit for a year, and then later on I was Special Assistant to Chief Justice Burger for three and a half years. In effect I shadowed them in their duties so that I have had some practice at the appellate level, even though I had no responsibility, of course.

Senator **Thurmond**. Before you went to the Claims Court, you seem to have had varied experience.

Judge **Mayer**. Yes, Senator.

Senator **Thurmond**. You served in the Judge Advocate General Corps, as Staff Judge Advocate; you were an associate in a law practice; Special Assistant to Chief Justice Burger; and you were an associate in the law practice of Baker and McKenzie; Deputy Special Counsel, Merit Systems Protection Board.

I just want the record to show that you did have a varied law practice and are qualified to fill this position, in addition to the experience you have had on the Claims Court.

Judge **Mayer**. Yes, Senator.

Senator **Thurmond**. Okay. Thank you very much.

Judge **Mayer**. Thank you, Senator.

Senator **Metzenbaum**. I might just include in the record the fact you were given a unanimously well-qualified rating, as you know, from the American Bar Association.

Judge **Mayer**. Yes, Mr. Chairman.

Senator **Metzenbaum**. Thank you very much.

Mr. Royce C. Lamberth, nominated to be U.S. District Judge for the District of Columbia. You have already been sworn, and I have a few questions.

Recently this Committee received testimony that more consideration should be given to members of the D.C. Bar and persons who have practiced in the District in the filling of the District of Columbia Federal Court vacancies. Do you think your ties to the District will make you a more effective judge?

TESTIMONY OF ROYCE C. LAMBERTH, OF ALEXANDRIA, VA, NOMINATED TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

Mr. **Lamberth**. I believe so, Senator. I am very pleased with the President's nomination.

I would like to introduce my wife first, if I may.

Senator **Metzenbaum**. Please excuse me for not giving you that opportunity. I apologize to you.

Mr. **Lamberth**. I am very happy my wife Janis is here with me today, Senator.

Senator **Metzenbaum**. And she votes "No"; is that it?

Mrs. **Lamberth**. She votes yes. [Laughter.]

Senator **Metzenbaum**. We are happy to welcome her, and I apologize for not having given you that opportunity earlier.

Mr. **Lamberth**. Thank you, Mr. Chairman.

I am delighted to be nominated by the President, and I am especially pleased as a career Government lawyer to appear before this committee today. I believe it is a tribute to Government lawyers that I was recognized in this process, and I am very pleased, having served under both the Carter administration and the Reagan administration, to be here today.

I have been in our courthouse for 13 years as an Assistant United States Attorney, and I have practiced extensively in our District Court. I think that because of my local practice here in the District of Columbia, I have received support from a lot of members of the D.C. Bar.

I think that it does help to have a familiarity with the District of Columbia and its practice. I understand, however, that both Democratic and Republican administrations have not always thought that was the prime qualification, but I am pleased to be the beneficiary of this nomination now, and having been a member of the D.C. Bar since 1974, I feel especially well-qualified to move to this position.

Senator **Metzenbaum**. With all your Texas background, why don't you talk Texan?

Mr. **Lamberth**. I lost that accent somewhere along the way, Mr. Chairman. I came up to Washington when I was in college, and law school, and worked in the summertime and always liked it here. When I came back from Vietnam, I asked to be assigned to the Pentagon so I could be in this area. I ended up staying here because I always liked the Washington area. And just somewhere in that process, that Texas accent disappeared. My wife still has a little more than I do.

Senator **Metzenbaum**. We may ask you to come back to the Judiciary Committee and teach some of these fellows who do not speak "Northern-ese"——[Laughter.]

Senator Thurmond, I am talking about you. Mr. Lamberth used to be a Texan, and he now speaks sort of Northern English, and I told him we may bring him back as a special consultant to teach some members of this Committee how to speak "Northern-ese", and I do not know whether I can prevail upon him to do it, but I have some special candidate in mind.

Now, coming back to our hearing, last year you gave a speech to the Pentagon Chapter of the Federal Bar Association. The subject was equal employment opportunity litigation against the military services. You defended the EEO record of the military, then made a statement which suggested that you disagree with the concept of equality in the military.

You said, and I quote,

> If the day comes that an assistant secretary of the military cannot reorganize his staff freely, and when and if the commander-in-chief of a major command cannot make his own personnel selections, then dramatic and devastating changes will have been wrought in the military's ability to manage its own affairs.

Now, that statement could be viewed as a statement of opposition to equal employment laws and executive services which apply to the armed services. Would you care to comment on that statement, because on its face it does raise some serious issues.

Mr. **Lamberth**. I really think, Mr. Chairman, you have to read the full text of the speech because, while that sentence might be susceptible to misinterpretation, the full text of what I was saying that day was that I believe in equal employment opportunity; I believe that the military has practiced it; I believe they must practice it; I believe they are obligated to do so. But I was praising the lawyers of the military for the good job they have been doing in ensuring equal employment opportunity for all employees at the Pentagon.

In fact, the specific example I gave was from a case that we had just litigated in our court in which the commander-in-chief of the army in Europe and the Assistant Secretary of the Army here in Washington were accused of discrimination. I firmly believed that they did not engage in any discriminatory practices and ultimately the District Judge who heard the case agreed with me and sustained our position that they had not discriminated.

If in fact they had discriminated, I do believe that would be wrong. And in the speech I made, I was trying to explain that I did not believe that there was this discrimination going on, and in fact, our position was ultimately sustained thereafter by the courts.

I do believe strongly in equal employment opportunity, and during my tenure as Chief of the Civil Division of the U.S. Attorney's Office, I have settled my share of cases where it became apparent that there was discrimination, unintentional or otherwise. In some cases, Government agencies do not necessarily intend to discriminate, but the impact or effect of their policies may be to discriminate. And in those cases, we have made sure that we settled, even massive class actions. There is one in the Post this morning in which we yesterday agreed to $2.4 million in back pay to a class of claimants at the Government Printing Office, because we believe——

Senator METZENBAUM. It took you 13 years to get to it.

Mr. LAMBERTH. Well, there was hard-fought litigation over where the discrimination was and who the discriminated employees were and how you identified those, so it did take litigation to get to that point. But I think that the opposing counsel in that case would say that they recognized my efforts were instrumental in ultimately selling the Justice Department on a settlement that was to the advantage of both the employees and the agency.

Senator METZENBAUM. Do you agree the military's personnel decisions must comply with the law on equal employment opportunity, or do you think the Pentagon should be immune?

Mr. LAMBERTH. No; I certainly think that the Pentagon must be accountable for equal employment opportunity.

Senator METZENBAUM. Would you be good enough to explain if you can—do you know whether or not the Washington Bar Association, which it is my understanding is a predominantly black bar association, would support your candidacy?

Mr. LAMBERTH. I do not know if they have taken a vote. Nathaniel Speights, who is the president of the Washington Bar Association, is a close personal friend of mine. I talked to him at the time that my nomination was being sent up, and he assured me that he supported me. I do not know if there was any vote of the Association or if in any other manner they manifested that support, but I know the president told me he would be willing to testify in my behalf or appear anywhere in my behalf.

Senator METZENBAUM. Well, because of that speech and because you are going to be a District of Columbia jurist, I think their position is quite relevant to your candidacy. I want to advise you that I am going to inquire of them formally as to whether they have a position or do not have a position, and whether or not they in any way have raised any concerns concerning your attitude on racial matters. I think it is very, very important that a judge in the District of Columbia be accepted as one who is unbiased, and I think you would agree. And I think from what you say, you have worked here long enough, and I would gather your relationships are good enough that you feel confident that the appropriate answer will be forthcoming.

Mr. LAMBERTH. Oh, I am very confident they will support me, Mr. Chairman. In fact, I have talked with several of the active members of the Washington Bar Association, about how to increase equal employment opportunity in my own staff. I now have five black lawyers on my staff of the Civil Division at the U.S. Attorney's Office, which is an all-time high. I have been very concerned about how we can increase the number of black lawyers on my own staff in trying to do what I can to promote equal employment opportunity, and I am sure there are many members of the Washington Bar Association who are well aware of the efforts I have made in that regard.

Senator **Metzenbaum**. For your entire legal career, you have worked for the Federal Government. You were in the military; you have been in the United States Attorney's Office since 1974. As a judge, will you be able to be impartial even though the case before you involves the Government as a party?

Mr. **Lamberth**. I certainly think so, Senator. I have a number of cases now where I am called upon to referee disputes between client agencies or between agencies and the Justice Department in our representation of them. I really in that sense try to be fair and objective. I try in everything that I do now, because I think it is my responsibility as a public servant, to be sure that the Government treats its citizens fairly, and I think that as a District Judge I will have a similar duty to be sure that the Government is applying the laws fairly and equally to all of our citizens.

I think that I have undertaken that oath as an Assistant United States Attorney, and that I will have a very similar oath as a United States District Judge.

Senator **Metzenbaum**. As head of the Civil Division of the U.S. Attorney's Office here in the District, you were involved in numerous cases involving awards of attorney's fees against the Government. Your office consistently took the position that the awards should be limited to $75 per hour, even though in a 1980 case, the *Copeland* case, it was held that the fee should be awarded at the market rate. Only after the *Laffey* case in 1984 did your office abandon its policy.

Question: Did you act properly in insisting on the $75 rate, and should your office have abandoned its policy earlier than 1984?

Mr. **Lamberth**. Well, Mr. Chairman, I certainly think we acted properly throughout. When the *Copeland* case was decided, the Court of Appeals said the attorney fees will be set by the market rate without any real definition of how you decide what the market rate is. And we undertook a great deal of litigation to decide how do you determine the market rate.

It seemed to us in the U.S. Attorney's Office in litigating these cases that you should look at what lawyers were taking cases from clients in this town for. And we got records, retainer agreements and bar records and other materials that indicated there were a lot of lawyers in this town who were taking these kinds of cases for $50 an hour; there were a lot of lawyers charging $60 an hour; and there were plenty of lawyers charging $75 an hour. So to us, it really meant that the courts had to define what is the market rate; how do you decide what is a reasonable attorney's fee.

Now, Congress when they passed these statutes, except for the Equal Access to Justice Act, just said "a reasonable attorney's fee" and put the word "reasonable" in virtually all of these 131 statutes. Congress left it to the courts to define.

The courts decided what the market rate is without any real guidance, until the *Laffey* case came along, explaining how you decided what the market rate is.

Now, *Laffey* to us did establish, then, a clear market rate. Our Court of Appeals finally said in 1984 when they decided *Laffey,* that a market rate means whatever this particular lawyer has been paid by other fee-paying clients—that is the market rate for this particular lawyer, and that is the rate you pay him. And when the *Laffey* decision became the final law of our Circuit, the U.S. Attorney's Office conformed its policy, and we started settling cases at up to $175 an hour.

Now, that was a hard pill for us to swallow, frankly, in the U.S. Attorney's Office, because we had been taking the position of the taxpayer in every one of these cases. When I stood up and argued myself, I always opened the argument with: "Your Honor, I stand here on behalf of the American taxpayer," and I continued my argument from there.

I am still proud of what we did in those cases in trying to conserve money for the American taxpayer, because even $75 an hour, Mr. Chairman, if you have 1,600 billable hours a year, means the lawyer is working at a rate of $120,000 a year. To me, that is ample and sufficient taxpayer money to go to pay that lawyer's expenses and fees from bringing the case. Ultimately, that position did not prevail in the courts, and we are now settling at $175 an hour, which means $280,000 a year for 1,600 billable hours.

It is a matter, I think, that still must be addressed by Congress. The Administration has proposed legislation to deal with that, and I still hope that Congress someday will take up the gauntlet and face up to that issue.

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. As I understand, when you recommended $75 an hour, you were just trying to protect the taxpayers.

Mr. LAMBERTH. That is right, Senator.

Senator THURMOND. Well, it is good we have somebody who tries to protect the taxpayers, isn't it?

Mr. LAMBERTH. I appreciate that, Senator.

Senator THURMOND. Unless somebody does it, they will not be protected.

I want to ask you this question. There is frequently a conflict between the deeply felt constitutional views of a Federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Mr. LAMBERTH. Well, I think, Senator, as a district judge, you have to start with the Constitution, of course, and you have to start with the Supreme Court precedent and the other precedents you are bound by.

I think you answer the question differently depending on at which level you are serving. As a district judge, I think most of the questions I am going to see will have been in one form or another answered either by the Supreme Court or by the court of appeals, whose decisions I will be bound by.

Certainly, in the attorney fee area, I understand the law very clearly now, and as a district judge, I am going to follow what our circuit has said the law is. I think that it depends upon where you are sitting, but I think on many questions you are going to be bound by precedent that you will have to follow.

I do think that you have to look first at the words of the Constitution.

Senator **THURMOND**. Mr. Lamberth, the phrase "judicial activism" is often used to describe the tendency of judges to make decisions on issues that are not within the scope of their authority. What does this phrase "judicial activism" mean to you?

Mr. **LAMBERTH**. I think, Senator, that it cautions a judge that your first step in the case has to be to look at why this case is before you, whether there is jurisdiction, whether there is standing, whether the case is ripe for a judicial decision, whether there is a political question presented that should be resolved by one of the other branches of Government, whether there is some administrative remedy that should be exhausted or could have been exhausted and has not been, whether the case really needs to be decided by the courts. And I think that sometimes in cases, counsel even see some interest in overlooking those questions and rushing to have the court decide all sorts of things that the courts really have no business interfering in.

I think that I as a district judge would have an initial obligation in every case that came before me to look and see if this case is really properly before the courts and if this case really ought to be decided by the courts. If counsel have not briefed and raised the question, I should direct them to do that as my first step in the case.

Senator **THURMOND**. I want to congratulate you on your appointment by the President. I believe the senators from Virginia have endorsed you. That is where you live now, isn't it, in Virginia, and they have both endorsed you.

Mr. **LAMBERTH**. That is right. I have been in Virginia for some time.

Senator **THURMOND**. I hope you have a happy tenure on the Bench.

Thank you, Mr. Chairman.

Mr. **LAMBERTH**. Thank you very much, Senator Thurmond.

Senator **METZENBAUM**. Thank you.

[The following material was subsequently supplied for the record:]

"THE DUTY OF GOVERNMENT LAWYERS TO CURB JUDICIAL ACTIVISM"

REMARKS BY ROYCE C. LAMBERTH
SEPTEMBER 11, 1986
1986 FEDERAL PRACTICE INSTITUTE
FEDERAL BAR ASSOCIATION

It is a pleasure for me to address the 1986 Federal Practice Institute of the Federal Bar Association. It was with some reluctance, however, that I agreed to be a luncheon speaker. I think I would do better in a panel discussion, or answering questions. I've been concerned about whether I can keep an audience awake after a heavy lunch. So I decided to pick a lively topic that is sure to make at least some people disagree with me. In fact, it might make some of you downright mad at me. If so, I will have accomplished at least one purpose of this speech.

I would like to talk about "The Duty of Government Lawyers To Curb Judicial Activism."

For those of you who are government lawyers, I hope to give you some candid thoughts about what I think the role of government lawyers should be. For those of you in private practice, I hope to expose you to some of our internal thought processes and advise you that, if you sue the government, you will have to combat the theories that I espouse today.

About 95% of what I do, and therefore what I'm going to be talking about today, is represent federal departments and agencies, and officials, who are sued for something they have done, or failed to do. In one sense, I have a client, just as a lawyer would in private practice. My client is the agency or official I am representing, and I must represent the interests of that agency or official in the litigation. But I also undoubtedly have a larger responsibility, to my client the United States. In that capacity, I must represent the interests of the government as a whole, and that includes, for one thing, remembering the purpose of the Department of Justice - that is, to do justice. Indeed, one of our mottos indicates that the United States wins its case whenever justice is done its citizens in the courts. Moreover, I think government lawyers have a special burden, both under Rule 11 of the Federal Rules of Civil Procedure and as officers of the court, that imposes special obligations on us beyond merely securing an immediate victory for our client agency or official in a pending case.

I believe that one of the most important affirmative obligations imposed upon the government lawyer is to review the government's so-called "technical legal defenses" and determine whether any are fairly arguable in the pending case. We have an affirmative duty to determine, in the first instance, whether Congress has waived sovereign immunity and allowed this type of lawsuit. We have an affirmative duty to determine whether there is a justiciable case or controversy. We have to determine whether the controversy is definite and concrete, touching the legal relations of parties having adverse legal interests, and whether it is a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as my old law school professor at the University of Texas, Charles Alan Wright, would say in his treatise on Federal Courts. As Professor Wright puts it:

> " . . . Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine."

Beyond sovereign immunity and case or controversy requirements, government lawyers have an affirmative obligation to consider other, related issues, such as standing, political question, jurisdiction of the tribunal, exhaustion of administrative remedies, ripeness, and mootness. All of these doctrines present important (and often difficult) legal questions that judicial activists are anxious to skip over. I believe it is our obligation, as government lawyers, to make sure that these issues are properly raised and considered. Only in doing so can we ensure the proper constitutional separation of powers that was envisioned by our Founding Fathers.

It is important for government lawyers to recognize the extent to which unelected federal judges, using the due process clause, have substituted their own judgments for those of the public's elected representatives. This "legislation" by the federal judiciary has been vigorously attacked by the Reagan Administration, and with good cause. For those who think government lawyers should shy away from such attacks, I recall that Benjamin Cardozo once wrote:

> "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."

While some judges do sometimes appear to be in ivory towers, they are nevertheless not cloistered away in monasteries.

There's actually a more pithy quote I could use, from 85 years ago, after the Supreme Court decided the Insular cases. Columnist Finly Peter Dunne caused his fictitious Irish bartender Mr. Dooley to speak the following prophetic words:

> "No matter whither th' constitution follows th' flag or not, th' Supreme Court follows th' illiction returns."

Although federal judges are appointed for life and are independent of direct popular control, it is nevertheless clear that basic changes in public sentiment can ultimately have an impact on the federal judiciary.

Judicial restraint is important to the constitutional principle of separation of powers. It is our duty, as government lawyers, to urge judicial restraint in all cases where it is appropriate. Let me give you an example. I argued the last case ever argued before Judge Harold Leventhal of our Court of Appeals. His untimely death of a heart attack the next day after my argument and his decision in my case has had a lasting impression on me. The case I argued involved the right of the government to prevent pro- and anti-Khomeini Iranians to demonstrate in front of the White House during the Iranian hostage crisis. We offered what we believed were adequate alternative sites, and Judge Leventhal, with an emergency panel of the Court of Appeals, ruled in my favor and upheld the government, reversing the Chief Judge of the District Court. I tell you all of this just by way of background about Judge Leventhal. During the Bazelon, judicial activist era, of our Court of Appeals, Judge Leventhal was often considered a swing vote in a number of 5-4 Circuit Court decisions. Judge Leventhal was, in fact, a pretty liberal judge who many would label an activist. But he was a thoughtful judge - indeed a brilliant man. And the opinion I want to call to your attention today is in the case of Association of Bituminous Contractors v. Andrus, 581 F.2d 853. In Judge Leventhal's concurring opinion, he said:

> One of the difficulties with this jurisdictional issue is that it was raised cursorily in the government's brief in this court. In fact, it turns out to be a prickly question, which required much judicial research. I can understand that the Secretary [of Interior] may be more interested in the merits, but I should have thought some of the reasons for centralizing court presentation in the Department of Justice were a greater awareness of the importance and complexity of jurisdiction issues and a readiness to devote the time required for their sound resolution.

I think that passage makes clear that Judge Leventhal would agree with my thesis today: that government lawyers have a duty to raise jurisdictional and other technical legal defenses and discuss them so that the courts can properly decide whether they have the power to entertain the pending action.

Another judge on our Court of Appeals, one who would probably not even shrink from the label "judicial activist", is Abner Mikva. In the case of Douglas v. Donovan, 704 F.2d 1276, he said the following:

> As the officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. See, e.g., Model Code of Professional Responsibility EC 7-20 (1981) ("our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently"). This is especially true for government attorneys, who have special responsibilities to both this court and the public at large. See, e.g., Model Code of professional Responsibility EC 7-14 (1981) ("[a] government lawyer in a civil action ...has the responsibility to seek justice and to develop a full and fair record").

We have one sitting District Court Judge who says "I don't want to hear about sovereign immunity or any of the government's other boilerplate technical legal defenses; get on to the merits, counsel." Admittedly, he can do that in open court, and not even allow us to present oral argument on questions like jurisdiction, standing, justiciability, ripeness, mootness, etc. So we have to be sure that we have created an adequate written record, in the form of a motion to dismiss, so that we can advance those arguments in the Court of Appeals without criticism that we failed to present them to the District Court. At any stage of a judicial proceeding we do that, even though we can always question a court's jurisdiction. I say to you, the District Judge to whom

I'm referring will learn at some point that we are getting an increasing number of what we call "dream" panels in our Court of Appeals. For a government lawyer, that's a panel like, for example, Bork, Scalia, and Starr, or Silberman, Buckley, and Williams. Or I could go on with others: take Bork, Silberman, and Buckley.

Let me give you one example of a case decided last month by a Bork/Scalia panel, with Judge Friedman visiting from the Federal Circuit. I think you could call that a dream panel - Danny Friedman spent a number of years in the Solicitor General's Office - part of it under Bob Bork - at the same time that Nino Scalia was the Assistant Attorney General for the Office of Legal Counsel. The case to which I'm referring was brought by Allen Sharp, the Chief Judge of the U.S. District Court for the Northern District of Indiana. It so happens that Chief Judge Sharp is also a Lt. Col. in the Air Force Reserves. Pursuant to a new Department of Defense Directive that required discharge or transfer to the Standby Reserves of all Ready Reservists who are "key" federal employees -- so that the employees are still available to keep the civil government functioning in the case of a national emergency -- the Air Force decided that federal judges are "key" federal employees and that Lt. Col. Sharp must be discharged or transferred. Lt. Col. Sharp sought, in our District Court, an injunction against Secretary Weinberger and the Secretary of the Air Force. The case was decided on the merits by District

Judge Oberdorfer, who found no statutory, regulatory, or constitutional violations and granted judgment for the Air Force. Our Assistant was confident that Judge Oberdorfer was right on the merits, and he proceeded to argue the merits to what I have called our "dream" panel on appeal. Judge Bork, as the senior judge on the panel, immediately interrupted to ask about the basis for the court's jurisdiction. Our Assistant said, "Let's assume jurisdiction." Judge Bork quite properly said, "not with this panel." And indeed, the remainder of the oral argument was solely devoted to jurisdiction. When the panel issued its published opinion on August 22, the opinion itself dealt almost entirely with jurisdiction. In fact, Judge Scalia noted that it was a commentary upon the inartfulness of the statutory jurisdictional provision that deciding the merits of the appeal was much simpler than deciding which federal court had jurisdiction to decide the case. Judge Scalia, for the panel, then proceeded to affirm the judgment of the District Court as to those claims over which the District Court had jurisdiction "for the reasons given in Judge Oberdorfer's careful opinion."

The D.C. Circuit has come a long ways from the Bazelon era, when it decided Laird v. Tatum. If you've been following the Rehnquist/Scalia confirmation hearings as closely as I have, you may have re-read Laird v. Tatum in the last few weeks. One of the best lines is that of Chief Justice Burger - The D.C. Circuit has done an excellent job of deciding what the legal issues are in this case, they just decided them wrong. Well, the D.C. Circuit decided a number of cases wrong - most notably, perhaps, Vermont Yankee v. NRC, about which Nino Scalia wrote a very famous article documenting the D.C. Circuit's refusal to follow Supreme Court precedent. When we got the D.C. Circuit reversed in Heckler v. Chaney, it was a very satisfying victory for us as government lawyers. In fact, the Supreme Court reversed the D.C. Circuit in every single D.C. Circuit case reviewed by the Supreme Court last year. Things are changing, however. President Reagan has now appointed 7 of the 12 judges on the D.C. Circuit, and any objective observer can already tell the difference.

President Reagan and the Department of Justice have not used any single issue or any so-called "litmus test" in the selection of these new judges. But they have used a process of selecting judges who are concerned about judicial restraint. They have appointed judges who are opposed to judicial activism. And they have appointed judges who expect us, as government lawyers, to raise the appropriate legal arguments to ensure that the courts exercise their proper responsibilities and no more.

Thank you for your attention today. I appreciated the opportunity to set forth my views on "The Duty of Government Lawyers To Curb Judicial Activism."

REMARKS BY ROYCE C. LAMBERTH MAY 13, 1986
BEFORE THE FEDERAL BAR ASSOCIATION
PENTAGON CHAPTER

It is a great honor for me to be invited to address the Pentagon Chapter of the Federal Bar Association. When I was an Army JAG Captain assigned to the Pentagon, these luncheon meetings were one of the few regular outings that I took from my office. I have very fond memories of those Federal Bar luncheons, and it is a great pleasure to be invited back.

I have personally handled a number of military cases litigated in the District of Columbia, as well as supervising all of the 4,000 pending civil cases we have against virtually every Federal agency in Washington. If the government bans red dye #2, some group will sue. If we don't ban red dye #2, some other group will sue. So we always have a heavy volume of litigation.

Some of the military cases I have worked on have included:

--- Berlin Democratic Club v. Rumsfeld, involving Army wiretapping and mail opening in Berlin and other intelligence activities overseas.

--- Walters v. Secretary of Defense, and its progeny, involving important questions of applicability of the statute of limitations to military discharge cases.

--- The Simcha Goldman case, decided in the Air Force's favor this term. I handled the TRO before the Chief Judge of our District Court, and the New York Times made a front-page story of this exchange I had with the Chief Judge before he issued the TRO:

C.J. Robinson: March AFB isn't going to blow up if Goldman is allowed to continue wearing his Yarmulke, is it?

AUSA Lamberth: No, Your Honor.

C.J. Robinson: And the Strategic Air Command isn't going to collapse if Goldman wears it another 10 days, is it?

AUSA Lamberth: No, Your Honor.

That's about all I was allowed to get out before the judge ruled. It was a long, hard way to that ultimate 5 to 4 victory in the Supreme Court. But I must say, a satisfying journey.

Today I want to turn to a subject that in my view is at least equally important to Yarmulkes, but which all too often takes a back seat as a litigation priority.

I am speaking of civilian EEO litigation.

Let me begin with an explanation of why I consider this area of law to be so important.

Several years ago at a Navy installation a difficult and controversial decision was reached. It was decided that a pending Title VII class action brought by a group of Black civilian personnel would be settled. The primary rationale behind the settlement was the feeling that for a monetary pay-out, it would be best to bring an end to that troubling, complex, labor intensive litigation.

The rationale behind the settlement worked -- for a while.

But then an element given second billing in the settlement consideration crept in and undid the benefits of the settlement.

Employee morale.

It seems as though another large class of minority employees --this time women--felt that their advancement had also been impeded. Spurred on by the settlement of the earlier class action--and perhaps even angered by it--barely 2 years after the first class action was settled, a class of several hundred female employees initiated suit.

And today, that Navy installation and its attorneys are back where they were 4 years ago. Burdened with an exorbitant piece of litigation and stripped of major elements of control over a part of the command's work force.

For the past few years and continuing through today, tremendous resources of the military departments have been committed to civilian EEO litigation.

For example, in Florida, at the Jacksonville Naval Air Re-Work facility, a class of 1800 Black employees have brought suit.

And here in the District of Columbia, a major class action brought by several hundred female computer personnel is entering its fifteenth year--fifteen years of commanders looking over their shoulders whenever major personnel decisions are made, fifteen years in which hundreds and sometimes thousands of hours of attorney time have been spent so that normal, managerial control can be resumed in that command.

Now don't misunderstand.

The military departments are not the only federal employers saddled with these suits, even in the District of Columbia.

A class action brought by all--and I repeat all--female foreign service officers and applicants at the State Department is now winding its way toward completion after 10 years in litigation.

Also in its tenth year, a Title VII class action brought by all Black special agents at the Drug Enforcement Administration is moving forward. It is now approaching the remedial phase after an adverse liability decision and a denial of certiorari in the Supreme Court.

And as I'm sure you can guess, as soon as the Black agents were successful, DEA was sued by a class of Hispanic agents looking for their day in court.

And, oh yes, White agents at DEA have now filed a reverse discrimination class action.

To say that there's been an explosion in this area would be something of an understatement.

Now all of this is troubling to us because we spend an enormous amount of time trying to persuade federal judges of a fact that is common knowledge everywhere--everywhere that is except in the federal judiciary. I'm speaking of the fact that the military departments have led the nation's employers--public and private--in EEO and affirmative action.

In fact, I'd like to commend everyone's attention to an article in the May 1986 issue of the Atlantic Monthly, by Charles Moskos, who's been studying EEO on the military side since the 1950's. It's his conclusion--a conclusion impressively supported by a combination of statistics and individual accounts --that the military in general and the Army in particular have been in the forefront of EEO and affirmative action.

What I'm here to do today--besides having told you why EEO litigation is so important to you and to military commanders --is to bring you up to date on what we've been doing in the past year to stave off this explosion in EEO litigation for the military and the lengths to which we've gone to persuade federal judges that the military departments are admirable performers in the field of Equal Employment Opportunity.

A.) To give you an idea of the sort of uphill battle we're fighting on behalf of the military, just recently, the post-Supreme Court oral argument on remand was held in Trout v. Lehman, the Navy's computer personnel class action. Because of the importance of this case, I've always had one of our top assistants in EEO field--and by definition one of the best EEO attorneys in the country, in my view--assigned to this case. Exorbitant sums have been spent on experts and after years of litigation, and thousands of hours of attorney time and studies and analyses, all of which demonstrate that women in the computer fields progress rapidly in the Navy, the District Judge interrupted our assistant in the third hour of oral argument and said "I don't care what the evidence shows, everyone knows the Navy treats women like second class citizens."

But I'm getting ahead of myself, because I did want to tell you a bit about the legal side, the truly legal side of the Trout case. In that case, in 1981 the district court decided that the Navy had discriminated against class members in assignment of grade at entry and promotions through the ranks.

We took an appeal.

And two years later, the court of appeals reversed.

First, the Court of Appeals found, as we had been telling the lower court for years, that the Civil Service Commission and the Office of Personnel Management were responsible for grade at hire, not the Navy. We also persuaded the Court of Appeals that just saying that the federal government was responsible for the hiring wasn't enough to sock the Navy with liability.

The Court of Appeals also found that the lower court erred badly in its evaluation of the statistical evidence. Unfortunately, rather than dismiss the case or remand it to the District Court, the Court of Appeals decided that the evidence was sufficient and it therefore affirmed the adverse decision as to promotions.

We persuaded the Solicitor General to take the case to the Supreme Court where in two per curiam paragraphs, we obtained a decision reversing the Court of Appeals and remanding the case to the District Court for fact finding, not biased assumptions, on the statistical issues.

Now, we have developed extensive statistical studies hoping to persuade the District Court of a proposition which is proven by all accurate statistics--namely, that the Navy's computer command isn't a bad place and wasn't a bad place for women to work since the mid-seventies.

B.) In Goffer v. Marsh, one of the senior female civilian employees in the Department of the Army contended that her demotion and eventual separation from federal service were orchestrated personally by an assistant secretary of the army. She claimed that he was motivated by her continued opposition to this administration's alleged retreat from EEO and EEO complaints adjustment. For several days last fall and for several more early this year, we put on a series of senior level Army officials, in our effort to disprove the plaintiff's allegations. In the end, in both the District Court and before the MSPB, the allegations were rejected, relying heavily upon our witnesses' testimony that the Army's commitment to EEO remains unwavering and, indeed, has been enhanced over the past several years.

And although we still have another round or two to go, I am hopeful and confident that we will continue to persuade the administrative and judicial bodies where this claim is pending that the Army retains a deep commitment to Equal Employment Opportunity.

C.) In a third case, Judge v. Marsh, a Black female civilian employed in the EEO field in U.S. Army, Europe, brought suit against the Army, contending that the Commander-in-Chief of the Army in Europe had passed her over for promotion because of discrimination. The government's evidence included testimony not only of the Commander-in-Chief himself, but also two general officers on the ranking panels--one, the Deputy Chief of Staff for Personnel of the Army in Europe, a Black three-star general; and the other a Brigadier General with responsibility for security matters, the first Black female general officer in the history of the Army. Although we don't yet have a decision in that case, I am hopeful that we have persuaded the court by the appearance and testimony of these General officers that the Army is indeed a leader in Equal Employment Opportunity.

To bring this to a conclusion, I'd like to go back to where I began on this subject.

Civilian based EEO litigation is assuming an increasing share of litigation resources, and that litigation is important not only because of the resources that it consumes, but because if the day comes that an assistant secretary of the military can't reorganize his staff freely and when and if the commander-in-chief of a major command can't make his own personnel selections, then dramatic and devastating changes will have been wrought in the military's ability to manage its own affairs.

But if the views that we are putting forth--that the military is an advantageous place for minorities to pursue careers and that the military maintains a firm commitment in the EEO field--if that view point can be proven and continue to be proven, then our work in class actions and major individual actions should prove a real boost to the military in the management of its operations.

In closing, let me say that we are deeply appreciative of all the assistance and support that we receive from the military services in the discharge of our litigation responsibilities. There is no doubt that, across the board, we consistently receive outstanding assistance from dedicated attorneys who care what happens to their cases and their clients. We are truly grateful for that support, and I want to close my remarks today with a big Texas "Thank You" to all of you who every day help us.

8 East Alexandria Avenue
Alexandria, Virginia 22301
May 27, 1987

Honorable Howard M. Metzenbaum
United States Senator
Committee on The Judiciary
Washington, D.C. 20510

Dear Senator Metzenbaum:

In response to your letter of May 14, 1987, I have prepared the attached responses to your questions.

Thank you for giving me the opportunity to clarify these matters. I will, of course, be happy to provide any additional information that would be useful.

Sincerely,

Royce C Lamberth

ROYCE C. LAMBERTH

Enclosure

Senator Metzenbaum's Questions

1. Q. In the case of Commonwealth of Puerto Rico v. Heckler, 745 F.2d 709, 714 n.7 (D.C. Cir. 1984), Judge Ginsburg wrote:

> Government counsel confirmed at oral argument that it is the policy of the United States Attorney in this District to settle fee applications without a context in court only when counsel accept rates not in excess of $75 per hour for partners and $60 per hour for associates.

Is this an accurate statement of the policy of the U.S. Attorney's office at the time?

A. Not exactly. Most cases were settled with a lump sum settlement, and counsel were never required to agree to accept any particular hourly rate. The United States Attorney at the time had a policy not to settle any attorney fee claim in excess of all the hours claimed times $75 per hour for lawyers with more than 7 years experience, $60 for lawyers with 5-7 years experience, $45 for lawyers with under 5 years experience, and $25 for paralegals and law clerks.

2. Q. When did the U.S. Attorney's office first adopt this policy, or a similar policy of declining to settle attorney fee applications except at or below a stated hourly rate?

A. July 14, 1978.

3. Q. Who originated the policy? What was your role in formulating it and carrying it out?

A. Earl J. Silbert, who was United States Attorney in 1978, originated the policy. I was not consulted about the matter, and my first knowledge of the policy came when I received a copy of a memorandum dated July 14, 1978, from Robert N. Ford, then Chief of the Civil Division, to all Assistant U.S. Attorneys announcing the new policy. A copy of this memorandum is attached.

When I became Chief of the Civil Division on October 1, 1978, I became responsible for carrying out Mr. Silbert's policy as the direct supervisor of all civil litigation handled by the Office of the United States Attorney for the District of Columbia.

After the Court of Appeals issued its panel opinion in Copeland v. Marshall on October 30, 1978, I was assigned to handle the en banc consideration of the case. The government's position was reviewed by Attorney General Griffin Bell, who personally approved the memorandum I filed with the Court of Appeals. Subsequently, the government's position was reviewed by Benjamin Civiletti, who had then become Attorney General, and with whom I met several times to discuss our position, our briefs, and the U.S. Attorney's settlement policy.

Each succeeding United States Attorney continued a settlement policy with a maximum hourly rate. This included Carl S. Rauh, Charles F.C. Ruff, Stanley S. Harris, and Joseph E. diGenova. As Chief of the Civil Division, I participated in a policy review with each of these United States Attorneys. Each independently and personally decided to continue the policy. I was in agreement with each decision made. I was responsible for carrying out the policy in my daily supervision of all civil litigation handled by our office.

4. Q. In your response to the Committee questionnaire, you wrote:

> Once the Court of Appeals for the District of Columbia Circuit finally clarified the law on attorney's fees in Laffey v. Northwest Airlines, we changed our attorney fee policies to conform to the law of our Circuit.

Prior to Laffey, the D.C. Circuit had decided many cases on attorney's fees that appeared to be inconsistent with the fee policy described above. See, e.g., Copeland v. Marshall, 641 F.2d 880 (1980)(en banc)(hourly rate should be based on "market value" rate); Environmental Defense Fund, Inc. v. Environmental Protection Agency, 672 F.2d 42 (1982)(approving rates of $110 and $90 per hour). Why did the government wait until the Laffey decision to abandon this policy?

A. Prior to Laffey, the law in the D.C. Circuit was not settled about what the "market" rate was or how it should be determined. Some court decisions took into account the different rates charged by big firms, small firms, solo practitioners, "reduced fees", court awards, and other factors (such as whether the "market" was all federal litigation or just Title VII litigation, etc.). There was no definitive decision of the D.C. Circuit defining the "market" rate until all this was finally resolved in Laffey. The Court of Appeals decided that the actual billing rates paid by other fee-paying clients to the particular lawyer seeking the award was the "market" rate. Attached is a listing, prepared on July 25, 1984, of the attorney fee decisions in our Circuit and District Courts which shows a wide range of hourly rates as the courts struggled to decide what were "market" rates after Copeland and before Laffey.

5. Q. Laffey was decided on September 28, 1984. It was reported in the Washington Post on October 11, 1985, more than one year later, that the U.S. Attorney announced the previous day that the policy had been "reluctantly changed." If Laffey was the reason for changing the policy, why was the change not made for more than a year?

A. The United States Attorney decided not to make the policy change necessitated by Laffey until after the Supreme Court decided whether to grant certiorari in Laffey.

The Supreme Court denied the petition for writ of certiorari in Laffey on June 17, 1985. The United States Attorney decided to announce the policy change to conform to Laffey only after the change was fully reviewed by the Department of Justice, and to announce the new policy with a formal press release which had been cleared in advance by the Department of Justice. Although I prepared the first draft of the new office policy and the press release in June, 1985, final clearance was not received from the Department of Justice until October 7, 1985. The new policy was announced by the United States Attorney on October 10, 1985. A copy of the United States Attorney's press release is attached. In the meantime my staff was negotiating settlements in all our pending cases to be effected as soon as the new policy was announced. The United States Attorney approved settlements of our four largest attorney fee cases on October 8, 1985. One was for $640,000; others were for $114,000; $88,000; and $48,000. Soon thereafter numerous other cases were also settled at the new Laffey rates.

6. Q. On February 15, 1985, nearly five months after the Laffey decision, Judge Oberdorfer of the District Court filed an opinion in the case of Kyles v. Secretary of Agriculture in which he wrote:

> The defendant contends that Laffey is not the law of this Circuit because of the possibility of a petition for a writ of certiorari.

604 F. Supp. at 435. Judge Oberdorfer also quoted a memorandum filed by your office, apparently on December 27, 1984, as stating, "this Court lacks discretion to make an award in accordance with Laffey . . .". Id. at 431.

Do these excerpts accurately describe the position of your office on the applicability of Laffey at the time of the District Court decision in Kyles? If not, what was your office's position on that issue?

A. A Court of Appeals decision is the law of the Circuit and must be followed by the District Court regardless of whether a petition for certiorari has been filed. Of course a District Court may choose to defer ruling and await the further guidance of the Supreme Court on the issue if certiorari is sought and granted. In the meantime, parties may certainly argue that the Court of Appeals was wrong and that they believe that the Supreme Court will or should overrule the Court of Appeals. In fact, in order to preserve an issue for appeal, a party might be required to so argue. Therefore, Judge Oberdorfer was required in Kyles either to (1) follow Laffey, since it was the ruling of the Court of Appeals, or (2) defer ruling in order to await further guidance from the Supreme Court. However, nothing precluded the government, as a party, from arguing in the interim that Laffey was wrongly decided, since there was a possibility of a petition for certiorari being filed in the Supreme Court and of Laffey being overruled.

Judge Oberdorfer stated in Kyles that:

> In support of the motion for reconsideration, defendant reiterated the contention that since the plaintiff had failed to substantiate the hourly rate sought, "this Court lacks discretion to make an award in accordance with Laffey. . . ."

Id. at 431.

The government's motion for reconsideration stated that:

> For the reasons fully set forth in its opposition to plaintiff's motion for attorney's fees and costs, defendant maintains that plaintiff has failed to substantiate the hourly rate sought, and that accordingly, this Court lacks discretion to make an award in accordance with Laffey. . . .

These quotes, when viewed in context, clearly show that the government argued that plaintiff had not made the factual showing required by Laffey; not that the District Court should ignore Laffey. The excerpts cited in the question do not fully reflect the position of this office at the time of Kyles nor at this time.

In short, Laffey was the law in this Circuit when it was decided. The District Court had to follow Laffey until it was overturned. The government could and did argue that Laffey was wrongly decided and might be overturned. Finally, the government argued that plaintiff in Kyles had not complied with the legal requirements of Laffey.

7. Q. In your view, when does a decision of the U.S. Court of Appeals for the District of Columbia Circuit become a precedent binding upon judges of the U.S. District Court for the District of Columbia? When the Court of Appeals decision is issued? When the time for seeking further review has expired? Or at some point thereafter?

A. When issued. See answer to number 6, above.

8. Q. In Copeland v. Marshall, the en banc decision of the D.C. Circuit identified two policies underlying the attorney's fee provisions of the civil rights laws:

> The primary purpose is to help persons obtain competent counsel with which to vindicate civil rights through litigation.... A second policy also underlies fee awards... [T]he prospect of liability for an attorney's fee may help deter discrimination and thereby obviate litigation.

641 F.2d at 895. Please give your views on how the policy of the U.S. Attorney's Office in the District of Columbia prior to 1985 has helped to advance the goals that underlie these statutory provisions.

A. The policy of the United States Attorney's Office for the District of Columbia has always been to pay counsel for successful plaintiffs in Title VII cases "a reasonable attorney's fee as part of the costs" (see 42 U.S.C. § 2000e-5(k)) in order to fully compensate them for successful litigation against the government and as a deterent to discourage further discrimination. However, Copeland provided that "the government has a 'deep pocket' and that any fee request should be examined with care . . . [and] that fees should be neither lower, nor calculated differently, when the losing defendant is the government." Id. at 896. Additionally, as then-Judge Griffin Bell observed in a leading case, fee-shifting statutes are not intended "to make the private attorney general's position so lucrative as to ridicule the public attorney general." Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974). Currently Federal government attorneys, as public attorneys general, earn a maximum annual salary of $72,500. (Of course, a salary for secretarial support as well as office rent and supplies must be added.) $75 per hour for 1600 billable hours (32 hours per week for 50 weeks) annually means that taxpayers would be paying these private attorneys' general at the rate of $120,000 per year to sue the government. The Court of Appeals has now determined that up to $175 per hour (or $280,000 per year) may be a "reasonable" fee and our office has settled cases at that rate since 1985.

We have always attempted to insure that the stated goals of Title VII are complied with, one of which is to insure that the "reasonable attorney's fee" provided for in the law is in fact reasonable and not a windfall to private counsel.

9. Q. A trial judge must be prepared not only to try cases, but also to facilitate their settlement. In your view, what is the proper role of a U.S. District Judge in encouraging the pre-trial settlement of cases?

A. A District Judge should encourage pre-trial settlement of every case by meeting with counsel and exploring settlement possibilities, as well as by promptly ruling on all pending motions and keeping deadlines set for each stage of the litigation. In non-jury cases, I am concerned that some judges enmesh themselves so deeply into settlement discussions that they may not be able to keep out of their minds some of the things they have learned in connection with settlement that might not otherwise be proper evidence admissible at trial. For that reason, I am in favor of innovative use of U.S. Magistrates to facilitate settlement discussions with counsel and, sometimes, directly with parties. We have had considerable success with that technique in the District of Columbia.

10. Q. One of the criticisms of the policies of the U.S. Attorney's Office in the District of Columbia on attorney's fee applications is that the Office's "nonnegotiable posture" impeded settlements and clogged the courts with an "unnecessary volume of attorney fee disputes." See *Commonwealth of Puerto Rico* v. *Heckler*, 745 F.2d 709, 714 (D.C. Cir. 1984); *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1330 (D.C. Cir. 1982). How do you respond to these criticisms? What can a U.S. District Judge do to encourage litigants -- even those who take "nonnegotiable postures" -- to settle cases?

A. I feel that much of the delay in resolving the attorney's fee issue in the District of Columbia is due to Congress' passage of statutes saying "a *reasonable* attorney's fee" rather than setting a statutory rate, as Congress did in the Equal Access to Justice Act. The courts then grappled for years with how to define what is a "reasonable" rate before finally resolving the issue in *Laffey*. I had hoped this would be settled in *Copeland* in 1980, but unfortunately, the "market" rate concept announced in *Copeland* was almost as ambiguous as a "reasonable" fee. I certainly thought the issue would be decided in *NACV* in 1982, but instead the Court of Appeals simply made these cases more difficult to litigate. The fact that it was so difficult for the courts to develop the standards does not indicate that the government was doing anything wrong in trying to protect the American taxpayer.

A District Judge can encourage settlements by making the law clear, as Judge Oberdorfer did in *Kyles*. I recommended against appeal of Judge Oberdorfer's ruling in *Kyles* on the hourly rate issue, since I had predicted in a memorandum to the Department of Justice prior to *Kyles* that any good District Judge would do exactly what Judge Oberdorfer did. The United States Attorney, the Assistant Attorney General for the Civil Division, and the Solicitor General all agreed with my recommendation, and *Kyles* was not appealed.

GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

ALL CIVIL ASSISTANTS

DATE: JULY 14, 1978

OM : RNF ROBERT N. FORD, CHIEF
Civil Division

BJECT: SETTLEMENT OF ATTORNEY'S FEES

Earl has informed me that effective IMMEDIATELY he will not authorize us to settle any attorney's fees in excess of $60 per hour. Accordingly, I suggest that you inform any of your opposing counsel that if they are going to seek attorney's fees in a statutory attorney's fee case that if they seek an amount which is in excess of $60 an hour we will not be authorized to settle the case and will have to litigate the attorney's fee issue.

Please let me know if you have any questions about this new policy.

cc: Earl J. Silbert
United States Attorney

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

5010-110

Memorandum

Subject	Attorneys' Fees Decisions	Date	July 25, 1984
To	ALL AUSA's and SAUSA's	From	Margaret Frost - Paralegal

For your information, attached is an updated list of attorneys fees decisions issued by the District and Circuit Courts for the District of Columbia. If you know of any other decisions that are not included on the list, please let John Oliver Birch know.

Attachment

July 25, 1984

ATTORNEYS FEES

TITLE	HOURLY RATE	CASE TYPE
*Vaughn v. Rosen, No. 73-1039 (D.C. Cir. 1973)	$85	FOIA
Smith v. Kleindiest, 1-10 (p. 651), 8 FEP 752 (D.D.C. 1974)	$40-$75	Title VII
Communist Party of the United States v. Department of Justice, No. 75-1770 (D.D.C. 1976)	$45	FOIA
Parker v. Matthews, 411 F. Supp. 1059 (1976), aff'd 561 F.2d 320 (D.C. Cir. 1977)	$30-$60	Title VII
Pealo v. Farmers Home Adm., 412 F. Supp. 561 (1976)	$50-$60	Housing
Rucker v. Matthews, No. 75-0531 (D.D.C. 1976)	$58.05 (average)	Title VII
Weahkee v. Perry, 16 FEP 755 (D.D.C. 1976)	$60	Title VII
Walden v. Boorstin, 16 FEP 1739 (D.D.C. 1976)	$50	Title VII
Williams v. Saxbe, 17 FEP 1657 (D.D.C. 1976)	$30-$65	Title VII
Zeldin v. Hoffman, No. 75-1913 (D.D.C. 1976)	$40	FOIA
Anderson v. Treasury, et al., No. 76-1404 (D.D.C. 1977)	Not based on hourly rate (awarded $2,000)	PA
The Founding Church of Scientology of Washington, D.C., Inc. v. Marshall, 439 F. Supp. 1267 (1977)	$60	FOIA
Copeland v. Usery, 14 FEP 1677 (D.D.C. 1977)	$57.17 (average)	Title VII
Pace v. Califano, No. 76-99 (D.D.C. 1977)	$52-$54	Title VII
*In Re Ampicillin Antitrust, Litigation MDL. No. 50, Misc. No. 45-70 (D.D.C. 1978)	$40-$200	Other

TITLE	HOURLY RATE	CASE TYPE
Cayce v. Adams, 18 FEP 465 (D.D.C. 1978)	$40-$75	Title VII
*Copeland v. Marshall, No. 77-1351 (D.D.C. 1978)	$51.65	Title VII
Kinsey v. Legg Mason Wood Walker, No. 71-1338 (D.D.C. 1978), aff'd No. 78-1994 (D.C. Cir. 1979)	$20-$65 Period of 1971-1978	Title VII
Parker v. Califano, 443 F. Supp. 789 (1978)	$35-$72	Title VII
Postow v. Oriental Bldg. Ass'n, 455 F. Supp. 781 (1978)	$60-$75	Other
Stephenson v. Simon, 448 F. Supp. 708 (1978)	$60	Title VII
American Broadcasting Companies Inc., et al. v. Department of Labor, et al., No. 78-1711 (D.D.C. 1979)	$55-$75	FOIA
Crooker v. Department of State, No. 79-1820 (D.D.C. 1979)	$5 (Prisoner)	FOIA
Jones v. United States Secret Service, et al., No. 78-0891 (D.D.C. 1979)	$10 PRO SE	FOIA
Marimont v. Califano, No. 1992-73 (D.D.C. 1979)	$50-$85	Title VII
Public Citizen Health Research Group v. Department of Labor, No. 76-887 (D.D.C. 1979)	$55	FOIA
Sonnenberg v. Adams, 18 Emp. Prac. Dec. 8875 (D.D.C. 1979)	$50	Title VII
Ward v. Postal Rate Commission, No. 77-0145 (D.D.C. 1979)	$50-$75	FOIA/PA
Williams v. Boorstin, No. 78-2408 (D.D.C. 1979)	$75	Title VII
Wolfson v. Department of Justice, No. 75-1714 (D.D.C. 1979)	$60-$75	FOIA

TITLE	HOURLY RATE	CASE TYPE
Jones v. Trailways Corporation, No. 78-1327 (D.D.C. 1980), 33 FEP 394	$75	Title VII
Williams v. Civiletti, et al., No. 74-0186 (D.D.C. 1980); Vacated (D.C. Cir. 1981)	$30-$85	Title VII
American Jewish Congress v. Kreps, No. 75-1541 (D.D.C. 1981)	$40-$75	FOIA
Bachman v. Pertschuk, No. 76-0079 (D.D.C. 1981)	$70-$100	Civil Rights
Blake v. Hoston, 513 F. Supp. 663 (D.D.C. 1981)	$40-$75 for period of 1976-1978	Title VII
Caton v. Barry, No. 80-1584 (D.D.C. 1981) Amended June 9, 1981	$50-$100	Other
Donnell v. United States of America, No. 78-0392 (D.D.C. 1981)	$40-$60	Voting Rights
Fells v. Brooks, No. 80-2981 (D.D.C. 1981)	$75	Other
Garnes v. Brown, No. 76-0974 (D.D.C. 1981); Deft's motion for partial reconsideration denied (2/23/82); Pltf's motion for relief from judgment granted in the amount of $22,504 (3/30/82)	$60-$100	Title VII
Green v. Department of Commerce, No. 77-0363 (D.D.C. 1981), Remanded No. 81-1791 (D.C. Cir. 1982)	$45-$95	FOIA
Indian Law Resource Center v. Department of the Interior, No. 79-0540 (D.D.C. 1981)	$70 (average)	FOIA
In Re: Ampicillin Antitrust Litigation, 526 F. Supp. 494 (1981)	$55 (average)	Other

TITLE	HOURLY RATE	CASE TYPE
In Re: Swine Flu Immunization Products Liability Litigation, MDL No. 330, Misc. No. 78-0040 (D.D.C. 1981)	$40-$75	Swine Flu
Kaplan v. Hirsch, No. 80-2898 (D.D.C. 1981)	Not based on hourly rate (awarded $1,500)	Contract
Kemp v. Williams, No. 77-2014 (D.D.C. 1981); Vacated and Remanded No. 81-1838 (D.C. Cir. 1982); Consent Order 1/5/83	$45-$60	Title VII
Konyha v. Dime Company, Inc., et al., No. 81-1149 (D.D.C. 1981)	Not based on hourly rate (awarded $1,487.50)	Other
Lawrence v. Franklin Investment Co., Inc., et al., No. 78-0919 (D.D.C. 1981)	$75	Other
Mangiapane v. Secretary of Transportation, No. 75-1239 (D.D.C. 1981)	$70	Title VII
Metropolitan Washington Coalition of Clean Air, et al. v. District of Columbia, Nos. 73-1424, 73-1844 (D.D.C. 1981)	$40-$175	Other
National Ass'n. of Concerned Veterans v. Secretary of Defense, No. 79-0212 (D.D.C. 1981), Remanded 675 F. 2d 1319 (1982)	$85	FOIA
North Slope Borough, et al. v. Cecil D. Andrus, et al.; National Wildlife Federation v. Cecil D. Andrus, et al; Village of Kaktovik, et al. v. Cecil D. Andrus, et al; 515 F. Supp. 961 (1981), Motion for Partial Reconsideration Denied, May 29, 1981	$45-$125	Other
Parker v. Lewis, No. 79-3443 (D.D.C. 1981); Remanded No. 81-1965 (D.C. Cir. 1982); Stipulation of Settlement and Dismissal 11/9/82 ($12,360.15)	$50 (pro se representation) $50-$138 (Attorneys)	Title VII

TITLE	HOURLY RATE	CASE TYPE
Quinto v. Legal Times of Washington, Inc., et al., 511 F. Supp. 579 (1981)	$5 law student (pro se)	Other
Smith v. Schweiker, No. 76-2311 (D.D.C. 1981); Amended No. 81-1860 (D.C. Cir. 1982) ($12,046.90 total)	$55-$65 ($9,988.25 total)	Title VII
Snead v. Harris, No. 77-2191 (D.D.C. 1/30/81) 33 FEP 397; 7/30/82	$80 $95	Title VII
Veterans Education Project v. Secretary of the Air Force, et al., 515 F. Supp. 993 (1981); Remanded No. 81-1741 (D.C. Cir. 1982)	$25-$110	FOIA
Welchel v. Lewis, No. 78-0514 (D.D.C. 1981)	$65-$85	Title VII/ Equal Pay Act
Breen v. Tucker, No. 78-2222; Breen v. District of Columbia, et al., No. 80-0709 (D.D.C. 1981) --Stipulation filed 10/29/81 for additional fees $289.47; Stipulation filed 7/30/82 for additional fees $574.84	$90	Title VII
Crowley v. Haig, No. 74-0494 (D.D.C. 1981)--9/25/81 Opinion 12/9/81 Opinion Reversed Nos. 81-2213 and 81-2352 aff'd No. 82-1007 (D.C. Cir. 1983)	$40-$148.28 $60-$148	Personnel Action/Back Pay Defensive fee Litigation discovery
Davis v. Warnke, No. 77-1707 (D.D.C. 1981)	$60 (non-court time)	Civil Rights
Chicago Title Insurance Company v. Kern, No. 80-3174 (D.D.C. 1981)	Not based on hourly rate (awarded $1,664)	Other
Shaw v. Library of Congress, No. 79-0325 (D.D.C. 1981)	$85	Title VII
Smith v. Navy, 78-0953, (D.D.C. 1981)	$75	Title VII

TITLE	HOURLY RATE	CASE TYPE
Pearch v. Pierce, No. 79-1651 (D.D.C. 1981)	$65	Title VII
Vines, et al. v. Hodges, et al., No. 75-1211 (D.D.C. 1981)	$40-$55	Other
Gee v. Boorstin, No. 77-1628 (D.D.C. 1981)	Not based on hourly rate (awarded $21,182.25)	Title VII
Valdez v. Ink, No. 80-0114 (D.D.C. 1981)	$60-$75	Equal Pay
Proctor v. Woodson, No. 79-0155 (D.D.C. 1981)	$65	Title VII
Bright v. Butler, No. 80-2401 (D.D.C. 1981); aff'd No. 82-1113 (D.C. Cir. 1982)	$60	Title VII
Harris v. District of Columbia Board of Education, et al., No. 81-1842 (D.D.C. 1981)	$65-$75	Other
Davis v. Bolger, 512 F. Supp. 61 (1981)	$70	Title VII
Stimpert v. Lewis, No. 79-1336 (D.D.C. 1981)	$50-$75	Equal Pay
Thompson v. Turner, No. 79-1565 (D.D.C. 1981)	$60-$80	Title VII
Roberts v. Solomon, No. 77-2188 (D.D.C. 1981)	$20-$100	Title VII
Jarrett v. Adams, No. 76-1824 (D.D.C. 1982).	$64-$85	Title VII
Means v. D.C. Board of Education, No. 78-2402 (D.D.C. 1982)	$65 through 1979 $75 thereafter	Other
Patsel v. District of Columbia Board of Education, 530 F. Supp. 660 (1982)	$80	Other
Davis v. District of Columbia Board of Education, 530 F. Supp. 1215 (1982)	$80	Other

TITLE	HOURLY RATE	CASE TYPE
Foster v. District of Columbia Board of Education, No. 82-0095 (D.C. 1982)	$80	Other
Lopez v. Rodriguez, No. 79-3102 (D.D.C. 1982)	Not based on hourly rate (awarded $22,000)	Other
Fells v. District of Columbia Education, No. 81-0821 (D.D.C. 1982)	Not based on hourly rate (awarded $1,290)	Other
Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (1982)	$75	EAJA
International Brotherhood of Painters and Allied Trades Union and Industry National Pension, et al. v. J&J Paint and Glass, No. 82-0902 (D.D.C. 1982)	Not based on hourly rate (awarded $482.60	Other
Environmental Defense Fund, Inc. v. EPA, 672 F. 2d 42 (1982)	$55-$110 Supp. Fee Application--$110	Other
Alabama Power Company v. Gorsuch, 672 F.2d 1 (1982)	$48	Other
Smalls v. District of Columbia Education, No. 81-0684 (D.D.C.)	$75	Other
Towell v. District of Columbia Board of Education, No. 81-0868 (D.D.C. 1982)	$75	Other
Warren v. District of Columbia Board of Education, No. 80-1841 (D.D.C. 1982)	$75	Other
Fund for Constitutional v. Government National Archives and Records Service, No. 76-1820 (D.D.C. 1982)	$45-$100	FOIA
Johnson v. District of Columbia Board of Education, No. 80-0897 (D.D.C. 1982)	$75	Other
Murray v. Weinberger, No. 75-2145 (D.D.C. 1982)	$45-$75	Title VII
Northwest Airlines, Inc. v. EEOC, No. 80-2192 (D.D.C. 1982)	$75-$110	FOIA/Title VII

TITLE	HOURLY RATE	CASE TYPE
Hobbs v. Schweiker, No. 76-2354 (D.D.C. 1982)	$65-$85	Title VII
Hoska v. Department of the Army, 694 F.2d (1982)--Remanded to MSPB re: amount of attorney fees for administrative appeal	$67.50 (Judicial Review)	EAJA
Sierra Club v. Gorsuch, 684 F.2d 972 (1982)	$110	Other
Del Manufacturing Company v. United States of America, No. 82-0153 (D.D.C. 1982)	$75	EAJA
Sahni v. Barry, No. 81-1215 (D.D.C. 1982)	$75	Other
NAACP, et al. v. Donovan, 554 F. Supp. 715 (1982)	$60-$75 (attys) $25-$35 (paralegals & summer assoc.)	EAJA
Del Carmen v. Boorstin, No. 81-1524 (D.D.C. 1982)	$75	Title VII
National Treasury Employees Union v. Department of the Treasury, No. 76-1404 (D.D.C. 1982)	$60-$70	Other
Bundy v. Jackson, No. 77-1359 (D.D.C. 1982); Vacated 10/12/82	$65-$100	Other
Zorn v. IRS, No. 80-2351 (D.D.C. 1982)(Additional $35 awarded to cover 1 hr. spent by plaintiff's counsel in preparing reply to defendant's memo on fees and expenses)	$110	FOIA
Morgan v. Barry, No. 81-1419 (D.D.C. 1983)	$55-$75	Other
Porter v. Miller, No. 80-0126 (D.D.C. 1983)	$65-$75	Title VII
Corley v. The Hecht Company, et al., No. 79-2474 (D.D.C. 1983)	$75-$125	Other

TITLE	HOURLY RATE	CASE TYPE
Connors v. Drivers, Chauffeurs and Helpers Local Union No. 639, et al., No. 82-1840 (D.D.C. 1983) --Supplemental Motion granted April 11, 1983	\$80-\$190	Other
Acosta v. The University of the District of Columbia, et al., No. 80-1267 (D.D.C. 1983)	\$65-\$115	Title VII/ Race and National Origin
Bellefonte Insurance Company v. Ronald K. Gaines, et al. No. 82-0748 (D.D.C. 1983)	\$60	Other
Murray v. Weinberger, No. 75-2145 (D.D.C. 1983)--additional fees awarded (See 2/11/82 Opinion issued in this action)	\$55-\$100	Title VII
Weisberg v. FBI, Nos. 78-0322 and 78-0420 (D.D.C. 1983)	\$53	Other
Des Moines Register and Tribune Company and Tom Knudson v. Department of Justice, et al., 563 F. Supp. 82 (1983)	\$35 in-house counsel \$75 outside counsel	FOIA
Citizen's Coordinating Committee on Friendship Heights, Inc., et al. v. Washington Metropolitan Area Transit Authority, 568 F. Supp. 825 (1983)	\$75-\$110	Other
National Geographic Society v. 3A Editores, S.A., No. 80-1684 (D.D.C. 1983)	Not based on hourly rate (awarded \$7,874.66 fees & costs--Defendant's counsel personally liable for \$1,500 of the above-mentioned total.)	Other
Aero Corporation v. Department of the Navy, No. 79-2944 (D.D.C. 1983)(SEE Memo in support of attys fees award)	\$55-\$142	Govt. Contract

TITLE	HOURLY RATE	CASE TYPE
Mary Roe and John Doe v. Lifespring, Inc.,et al., No. 81-3215 (D.D.C. 1983)	$75	Other
Metrocare, et al. v. Washington Metropolitan Area Transit Authority, No. 78-1003 (D.D.C. 1983)	$75-$150	Title VII
Childress v. Washington Metropolitan Area Transit Authority, No. 82-2786 (D.D.C. 1983)(SEE Documentation in support of award of costs and attorneys fees)	$100	Other
United States for the use and benefit of Eastern Foundation Co., Inc. v. Blake Construction Company, Inc., No. 66-3371 (D.D.C. 1983)	$12,944 for efforts in Ct. Cl.	Contract-Indemnity Clause
Bachman, et al. v. Miller, et al., 567 F. Supp. 317 (1983)	$40-$135	Title VII/ Race
Laffey, et al. v. Northwest Airlines, Inc., 572 F. Supp. 354 (1983) Order correcting fee opinion 8/4/83	$75-$175	Title VII
Arnold v. Commerce, No. 81-1968 (D.D.C. 1983)	$90-$110	Title VII/ Race
Impro Products, Inc. v. Block, 569 F. Supp. 1389 (1983)	$23-$83	EAJA
Commonwealth of Puerto Rico v. Heokler, No. 82-2695 (D.D.C. 1983)	Not based on hourly rate (awarded $12,500)	Other
Blitz v. Donovan, No. 82-0706 (D.D.C. 1983)	$75	EAJA
Environmental Defense Fund, Inc. v. EPA, et al., No. 82-1346 (D.C. Cir. 1983)	Not based on hourly rate ($6,102.19)	EAJA
Wolfe v. Department of Health and Human Services, No. 80-1753 (D.D.C. 1983)	$3315 (63.5 hrs.)	FOIA

TITLE	HOURLY RATE	CASE TYPE
Turgeon v. Howard University, No. 81-2973 (D.D.C. 1983), 33 FEP 389	$95-$150	Title VII
O'Brien v. Love, et al., No. 81-1120 (D.D.C. 1983)	$65 (attorney was held personnally	Discovery Sanctions/ Nongovt.
Krodel v. Young, 576 F. Supp. 390 (1983)	$65-$80	ADEA
Donovan v. Goldstein, et al., No. 83-0940; Crawford,et al. v. La Boucherie Bernard, Ltd., et al., No. 83-0780 (D.D.C. 1984) (Interim Award of Fees)	$75 for all attorneys and law clerks, irrespective of experience or skill.	Other
Arrington, et al. v. National Broadcasting Company, Inc., No. 81-2019 (D.D.C. 1984)	$110 attorney $30 paralegal (certified legal assistant and law student)	Other Nongov't (labor law)
Rhinehart, et al. v. Bureau of Indian Affairs, et al., No. 78-2472 (D.D.C. 1984)	$8,000 (ct. reduced requested fee award--$20,741.25 for failure to document hours)	EAJA
American Academy of Pediatrics, et al. v. Heckler 580 F. Supp. 436 (1984)	$75 $10 paralegal/ Law clerk	EAJA
Ashton, et al. v. Pierce, et al., 580 F. Supp. 440 (1984)	$9-$11 paralegal/Law clerk $48,500 Dct. work $24,000 court of appeals work (reduced total # of hrs. expended)	EAJA
Parker v. Boorstin, No. 82-3513 (D.D.C. 1984) (fees awarded to govt.)	$1,001.231	Title VII
Parker v. Boorstein, No. 82-3102 (D.D.C. 1984) (fees awarded to govt.)	$745.15	Title VII

TITLE	HOURLY RATE	CASE TITLE
Garber, et al v. Randell, No. 2405-72, 2406-72; Natale v. Randell, No. 2407-72 (D.D.C. 1984)	$5,657,006.37	Other/ Class action (Securities fraud)
Planells v. Howard University, No. 81-2973 (D.D.C. 1984)	$75-$105 $40 (law clerks)	Title VII
Carter v. Duncan-Huggins, Ltd., No. 81-0546 (D.D.C. 1984)	$85 Trial Preparation $125 Trial	Title VII Nongovt.
Ahrens v. OPM, No. 81-0338 (D.D.C. 1984)	$4,805 Attorney & Paralegal time $1,125 Supp. App. for fees & expenses	EAJA
Thompson v. Sawyer, No. 74-1101 33 FEP 1327 (1984) (fees against unsuccessful intervenor)	$60-$150 $45 lawclerk	Title VII Nongovt.
Kay v. Fowler, et al., NO. 83-1876 (D.D.C. 1984)	$75 $30 lawclerk	Other/ Nongovt.
Connolly v. Heckler, No. 82-2917 (D.D.C. 1984)	$75	EAJA
Freeman v. Dole, et al., No. 76-1587 (D.D.C. 1984)	$125 partner $85 associate $35 Senior law clerk $25 Junior law clerk $15 paralegal	Title VII
Wichita and Affiliated Tribes of Oklahoma v. Clark, et al., No. 83-0602 (D.D.C. 1984)	$90-$125	Other/ Sanctions
Hawkins v. Dolphin and Evans Title Insurance Agency, Inc., No. 83-2254 (D.D.C. 1984)	$100	Other
Natural Resources Defense Council, et al. v. EPA, Nos. 75-1698, 2153-73, 75-1267, 75-172 (D.D.C. 1984)	$40-$100	Other

TITLE	HOURLY RATE	CASE TITLE
Carter v. Duncan - Huggins Ltd., No. 81-0546 (D.D.C. 1984) (See other opinion dated 4/19/84 re fees for counsel's pretrial and trial work)	$85 Post-trial and appellate $125 appellate oral argument	Title VII/ Race
Schmid v. Frosch, No. 80-0097 (D.D.C. 1984)	$75-$125	ADEA

NOTE: An asterisk next to the title indicates that a copy of the opinion is not among those that are available in the Attorneys' Fees' Award Opinion File located in Margaret Frost's office.

October 10, 1985

PRESS RELEASE

JOSEPH E. DIGENOVA
UNITED STATES ATTORNEY FOR
THE DISTRICT OF COLUMBIA

Joseph E. diGenova, the United States Attorney for the District of Columbia, announced today in response to press inquiries that the policy of the U.S. Attorney's Office of settling attorney's fees in civil cases for no more than $75 per hour has been reluctantly changed as a result of several court decisions.

The United States Court of Appeals for the District of Columbia Circuit had squarely rejected the hourly rates urged by the U.S. Attorney's Office, in Laffey v. Northwest Airlines, Inc. The decision in Laffey requires that attorneys be compensated at the rates which they are paid by their paying clients for similar cases, so long as those rates are within certain bracketed amounts (which, in Laffey itself, ranged up to $175 per hour). The Supreme Court declined to review the Laffey decision, and Judge Louis F. Oberdorfer of the District Court has applied Laffey to the United States in the case of Kyles v. Secretary of Agriculture. The Acting Solicitor General has now declined to seek further review of Judge Oberdorfer's decision in Kyles, and it is now clear that Laffey constitutes the law that the United States must follow in the District of Columbia Circuit.

Mr. diGenova noted that despite the policy change he has been forced to make, he adheres to the view that the limitation of $75 per hour prescribed by Congress under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorney's fees against the United States. For that reason, Mr. diGenova believes that it is now even more important that the Congress enact the Department of Justice's proposed Legal Fees Equity Act, currently pending as S.1580 and H.R. 3181. Deputy Attorney General D. Lowell Jensen testified Tuesday before the Senate Committee on the Judiciary, Subcommittee on the Constitution, in favor of S.1580. As the Deputy Attorney General told the Senate:

> "The need for corrective legislation is heightened by the fact that, under present law, federal litigators may be powerless to limit fee awards to reasonable levels. For example, since Laffey v. Northwest Airlines, Inc. . . . . the D.C. Circuit has repeatedly chastised government attorneys for refusing to settle fee applications without contest for more than $75 per hour for partners and $60 per hour for associates."

The Legal Fees Equity Act would amend all existing fee-shifting statutes to provide a maximum award against the United States of $75 per hour. Such a statute would put an end to inconsistent interpretations by various courts of what is a "reasonable" attorney's fee, which is currently the requirement of most fee-shifting statutes other than the Equal Access to Justice Act. The Legal Fees Equity Act would reduce excessive fee awards, and greatly reduce the amount of litigation over attorney's fees.

Mr. diGenova observed that $75 per hour for 1600 billable hours (32 hours per week for 50 weeks) annually means that taxpayers would be paying at the rate of $120,000 per year for attorneys to sue the government. Fee-shifting statutes are to encourage attorneys to serve as private attorneys' general, and several court decisions have held - before Laffey - that private attorneys general should be paid at rates comparable to the public attorneys general, which is a maximum of $68,700 per year (the maximum salary for Federal Government attorneys) plus overhead. Mr. diGenova commented that $120,000 per year should provide sufficient incentive to ensure that individuals' statutory rights are protected and, at the same time, recognize that this money is being paid by the American taxpayer.

Nevertheless, under the policy announced today by Mr. diGenova, until and unless Congress enacts the Legal Fees Equity Act, the U.S. Attorney's Office is now being forced to settle cases in the District of Columbia at whatever rates lawyers can establish as their actual billing rates to fee-paying clients. In the Laffey case, the maximum was $175 per hour, or $280,000 per year.

Although Mr. diGenova is confident that the Department of Justice will continue to litigate this issue in other Circuits and look for an appropriate attorney's fee case to seek further review by the Supreme Court, it is clear that prompt enactment of the Legal Fees Equity Act is the only real answer to this problem. In Mr. diGenova's opinion, Congress should establish a reasonable rate which Congress believes fairly compensates attorneys who bring suit without requiring taxpayers to pay outrageous hourly rates. The Washington Post correctly noted in an editional cited by Deputy Attorney General Jensen in his Senate testimony that "[j]ust because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous."

In Mr. diGenova's view, it is to everyone's advantage to put an end to all of this attorney fee litigation by having Congress set a rate. Congress has now passed some 131 statutes providing attorney's fees to people who are successful in litigation against the government. The Equal Access to Justice Act is the only such statute in which Congress set an hourly rate. Congress decided $75 an hour was appropriate when the Equal Access to Justice Act first passed, and Congress again found $75 per hour to be appropriate when it re-enacted the Equal Access to Justice Act on August 5, 1985.

Mr. diGenova concluded by stating that he "hoped Congress will set a statutory rate rather than continuing to let each judge decide what is a reasonable attorney's fee. This case-by-case, judge-by-judge, Circuit-by-Circuit, approach, is wasteful and unproductive, and Congress should put a stop to it by enacting the Legal Fees Equity Act."

THE WASHINGTON BAR ASSOCIATION

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Dedicated to the principle "*Equal Justice Under Law*"

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May 29, 1987

Hon. Howard Metzenbaum
Room 308
Hart Senate Office Building
Washington, D.C. 20510-6275

Re: Royce C. Lamberth

Dear Senator:

Pursuant to your request, enclosed are the comments of the Washington Bar Association on the nomination of Royce C. Lamberth to the United States District Court for the District of Columbia.

Please know that the Bar is encouraged by your careful scrutiny of Judicial Nominees to District of Columbia Federal Courts. We hope you will continue this effort and pledge our support in this matter.

Very truly yours,

Nathaniel H. Speights

NHS:dwh

STATEMENT OF NATHANIEL H. SPEIGHTS
PRESIDENT
THE WASHINGTON BAR ASSOCIATION
ON THE NOMINATION OF
ROYCE C. LAMBERTH
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
BEFORE THE
JUDICIARY COMMITTEE
UNITED STATES SENATE
MAY 29, 1987

My name is Nathaniel H. Speights. I am President of the Washington Bar Association. The Association is America's oldest and largest local voluntary bar founded by Black lawyers. We are an affiliate of the National Bar Association. As you are well aware, our Bar Association was founded because segregation prevented participation of Black lawyers in legal affairs affecting the Bench. The Washington Bar Association with the other voluntary bar associations and with the unified District of Columbia Bar, opposes the policy and procedure which prevents citizens of the District of Columbia from meaningful participation in the selection of Federal Judges. We of course realize that citizens of the District of Columbia have no elected representative in the United States Senate. Thus we realize it is not possible to exercise the privilege of Senatorial courtesy with respect to the appointment of Federal Judges.

On April 1, 1987, we concurred in the testimony of Paul Friedman, President of the District of Columbia Bar, who testified on the nomination of Judge David B. Sentelle to the United States Court of Appeals for the District of Columbia Circuit. We made two points: First, despite the Court's presence in a locale which boasts the third largest state bar association in the country and has 45,000 lawyers licensed to practice here, the D.C. Circuit includes only one person who is a genuine product of the local legal community. Second, despite the large number of women and minority lawyers in the District of Columbia, all eight Reagan appointees to the D.C. Circuit and all six nominees to the United States District Court for the District of Columbia have been white males. While the Bar remains concerned that yet another white male has been nominated to the federal bench here and that no woman or minority has yet been nominated by the Reagan Administration, we nonetheless support the nomination of Royce C. Lamberth. Mr. Lamberth is an experienced local practitioner and a member of the District of Columbia Bar. If he is confirmed, we are certain that Royce Lamberth will review and adjudicate matters of Civil Rights Act violations with fairness.

On a personal note, it is well known that Royce Lamberth is a friend of mine. I believe him to be of the highest moral character and find that the allegations of insensitivity in the enforcement of Civil Rights Act violations to be inconsistent with his sense of fair play and integrity. I personally believe the alleged insensitive statements attributed to Mr. Lamberth to be the result of inartful draftsmanship by staffers assigned to prepare his speech. While the Bar Association must support Mr. Lamberth within the confines of its policies, I personally support his nomination without reservation.

Rec'd 5-13-87 ssm

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PLF:MVA

May 8, 1987

BY HAND

The Honorable Patrick J. Leahy
Judiciary Committee
United States Senate
SD-226
Dirksen Senate Office Building
Washington, D.C. 20510-4501

Re: Nomination of Royce C. Lamberth
to United States District Court
for the District of Columbia

Dear Senator Leahy:

The Board of Governors of The District of Columbia Bar has authorized me to advise you and the Senate Judiciary Committee that, consistent with its posture with respect to other nominees to the federal courts in the District of Columbia, the Bar is not taking a position on the qualifications of Royce C. Lamberth to be a judge of the United States District Court for the District of Columbia but instead will limit its comments to the process and policy involved in the nomination of Mr. Lamberth.

The Board has asked me to advise the Committee that the Bar remains concerned that yet another white male, the fourteenth in a row, has been nominated to the federal bench in the District of Columbia by the Reagan Administration, while no woman or minority has been nominated to either the United States Court of Appeals for the District of Columbia Circuit or the United States District Court for the District of Columbia. The Bar is nevertheless pleased that with the nomination of Mr. Lamberth, a local practitioner and a member of The District of Columbia Bar, who has significant trial and litigation experience, has been selected for appointment to the current vacancy on the United States District Court for the District of Columbia.

On a personal note, and not speaking on behalf of the Bar or its Board of Governors, I can say that I have known Mr. Lamberth for fifteen years and have been both on the same side and on the opposite side of cases with him. I think he is an outstanding lawyer who will be an excellent addition to the Court and a first-rate judge. I look forward to his speedy confirmation.

Sincerely,

Paul L Fried

Paul L. Friedman

Senator **Metzenbaum**. Mr. Robert D. Wallick, president of the Federal Circuit Bar Association; Mr. Robert C. Kline, president of the American Intellectual Property Law Bar Association; Mr. Frederick L. Ikenson, chairman of Judicial Selection Committee, Customs and International Trade Bar Association. And we also have Thomas M. Devine, of the Government Accountability Project and Mark Roth of the American Federation of Government Employees.

Would you all stand, please? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. **Wallick**. I do.

Mr. **Kline**. I do.

Mr. **Ikenson**. I do.

Mr. **Devine**. I do.

Mr. **Roth**. I do.

Senator **Metzenbaum**. Take your seats, please.

The Chair will ask each of you to confine your remarks to 5 minutes, and we will ask staff to keep the time for me, please.

Mr. Wallick, we are happy to hear from you, sir.

TESTIMONY OF A PANEL INCLUDING: ROBERT D. WALLICK, ESQ., PRESIDENT, THE FEDERAL CIRCUIT BAR ASSOCIATION, ACCOMPANIED BY CLARENCE T. KIPPS, JR., ESQ.; ROBERT C. KLINE, ESQ., PRESIDENT, AMERICAN INTELLECTUAL PROPERTY LAW BAR ASSOCIATION; FREDERICK L. IKENSON, ESQ., CHAIRMAN, JUDICIAL SELECTION COMMITTEE, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION; AND THOMAS M. DEVINE, ESQ., DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT, ACCOMPANIED BY MARK ROTH, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. **Wallick**. Thank you, Mr. Chairman and Senator Thurmond.

My name is Bob Wallick. I have with me Mr. Clarence Kipps. We are pleased to present testimony on behalf of the Federal Circuit Bar Association, the bar association of the U.S. Court of Appeals for the Federal Circuit.

I would like to address briefly the criteria to be employed in the appointment and confirmation of judges to that court and the qualifications of Judge Robert Mayer for that court.

I am president of that Bar Association and a partner in the law firm of Steptoe and Johnson. Mr. Kipps is Chairman of the judicial selection committee of our association and a member of the law firm of Miller and Chevalier. Clarence and I have practiced before the old U.S. Court of Claims for many years and before the U.S. Court of Appeals for the Federal Circuit since its creation.

Our bar association is a national organization with slightly over 1,400 members. The members and leaders of the association come from all areas of the country. The leaders come from diverse backgrounds and diverse practices. The organization was formed in order to have the many different practice areas merged into one organization.

The Court of Appeals for the Federal Circuit is an extremely important court, with a specialized but diverse jurisdiction. In such areas as contract claims, patents and trade, this court has exclusive appellate jurisdiction, and its precedents are binding on many courts, boards and governments.

In other areas, the court's decisions on such matters as tax, other trade issues, civilian and military personnel, just compensation, have enormous and far-reaching effects.

But it is imperative that highly-qualified people be appointed as judges to serve on this court. Our association deliberated long and concluded that the most important qualities to look for are the ability, integrity and judicial capacity in selecting judges, and we do not favor emphasizing the particular background from which a person comes. That is an important element in deciding their qualifications, but we believe that the court should have upon it the very best individuals that can be found.

To that end, we believe that Judge Robert Mayer meets those qualifications. He has served with distinction since his appointment to the U.S. Claims Court in December 1982. His prior service as a law clerk to a U.S. circuit judge and as Special Assistant to the Chief Justice of the United States were early and good training for the Federal circuit. He has extensive litigation experience in private practice, and he also has served with distinction in government.

Clarence and I met Judge Mayer shortly after his appointment to the Claims Court, and we both have been very impressed with his judicial qualities, as was our entire board, which unanimously supported him.

He talks, performs and lives as a judge should. He has a high intellect and integrity and is devoted to the law and the improvement of justice. In addition, he is objective, works hard, and he is a very nice person.

In sum, Judge Mayer meets our association's high standards, and we strongly support his confirmation.

We appreciate this opportunity to be of assistance to this committee and would be pleased to answer any questions which you might have.

Thank you, Mr. Chairman and Senator Thurmond.

Senator METZENBAUM. Thank you very much, Mr. Wallick.

[Statement follows:]

TESTIMONY OF
THE FEDERAL CIRCUIT BAR ASSOCIATION
BY
ROBERT D. WALLICK
AND
CLARENCE T. KIPPS, JR.

Mr. Chairman and Members of the Committee:

My name is Bob Wallick and I have with me Clarence Kipps. We are pleased to present testimony on behalf of the Federal Circuit Bar Association on (1) the criteria to be employed in the appointment and confirmation of judges to the Court of Appeals for the Federal Circuit and (2) the qualifications of Judge Robert Mayer.

I am President of the Federal Circuit Bar Association, and I am a partner in the law firm of Steptoe & Johnson, Chartered. I have practiced before the Court of Claims for many years and the Court of Appeals for the Federal Circuit since its creation in 1982. I am also a former Chairman of the Public Contracts Section of the American Bar Association.

Clarence Kipps is Chairman of the Judicial Selection Committee of the Association and a member of the law firm of Miller & Chevalier, Chartered. He has practiced before the Court of Claims for many years and the Court of Appeals for the Federal Circuit since its creation. Clarence was a law clerk with the Court of Claims and was actively involved in the creation of the Court of Appeals for the Federal Circuit. He also serves on the Court's Advisory Committee.

The Federal Circuit Bar Association is a national organization with slightly over 1,400 members. The members and leaders of the Association come from all areas of the country and represent all areas of the Court's jurisdiction. The Association was organized to unite the many different practice groups with the view of improving the administration of justice. The Association provides a forum for common concerns and dialogue between Bar and Court, Government counsel and private practitioners, and litigators and corporate counsel. Periodically it sponsors regional seminars reviewing current practice in the Court.

As this Committee well knows, the Court of Appeals for the Federal Circuit is an extremely important Court with a specialized but diverse jurisdiction. In such areas as contract claims and patents, this Court has exclusive appellate jurisdiction, and its precedents are binding on many Courts, Boards, and Government Departments and Agencies. Likewise, the Court's decisions in tax, trade, civilian and military personnel and just compensation cases have enormous and far-reaching effect on the rights of citizens and the Government. The economic impact of this Court's decisions is astronomical. Thus, it is imperative that highly qualified people be appointed as judges to serve on this Court.

For this reason, involvement in judicial selection is one of the most important functions of the Association. The charter of the Association's Judicial Selection Committee provides:

> The primary responsibility of the Judicial Selection Committee should be to create an environment which will cause the appointment of highly-qualified judges to the CAFC. Such an environment should be created through:
>
> 1. Continued education of the White House and Department of Justice officials involved in the appointment process of the importance of the CAFC and the necessity to appoint judges commensurate with the status of this Court.
>
> 2. Timely notice to the Bar of vacancies, together with a brief description of the CAFC.
>
> 3. Evaluation of candidates and inclusion of only highly-qualified persons on a list approved by the Board of Governors of this Bar Association. The ability, integrity, and judicial capacity shall be the criteria for any judicial selection activity of this organization. Expertise in any legal speciality shall not be a prerequisite for recommendation but may be considered in assessing the ability of the candidate. This list shall be made available to the appointing officials, as well as to the Bar in general.
>
> 4. Opposing the nomination and appointment of unqualified judges to this Court.
>
> 5. Continued search for means to assure the appointment of highly-qualified judges to this Court.
>
> 6. Keeping the deliberations of the Committee and the Board of Governors in confidence.

The Federal Circuit Bar Association believes that its criteria for selection of judges should be the same as the President's criteria for nomination and this Committee's criteria for confirmation. These criteria are high ability, integrity, and judicial capacity. These criteria include objectivity and judicial temperament.

This Court has a specialized but diverse jurisdiction. We firmly believe that substantive expertise in any legal specialty is not a prerequisite for appointment to this Court. We know this view differs with some of our brethren associations. Nevertheless, we are unswerving in our conviction that able and objective judges with judicial temperament and devotion to justice render high quality justice without having an independent substantive expertise in the particular area. In our view, it is up to counsel to present the case in a manner that can be understood by any able and objective judge.

In the Senate Judiciary Committee Report accompanying the Federal Courts Improvement Act of 1982, this Committee pointed out:

> The Court of Appeals for the Federal Circuit will not be a "specialized court," as that term is normally used. The court's jurisdiction will not be limited to one type of case, or even to two or three types of cases. Rather, it will have a varied docket spanning a broad range of legal issues and types of cases. It will handle all patent appeals, plus government claims case and all other appellate matters that are now considered by the CCPA or the Court of Claims--cases which contain a wide variety of issues. (S. Rep. No. 97-275, p. 6)

Section 103 of the Act provides:

> (3) * * * The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard * * *.".

Balance on the Court is far more important than a candidate's substantive knowledge of a particular area of law. For example, we do not want a Court composed of people with only backgrounds in Government. Most of the judges should come from the private sector. Backgrounds in both Government and private practice or in both plaintiff and defendant practice are preferable. The broader the composite knowledge and experience of the Court, the more realistic and less ivory tower will be the Court's decisions.

We consider substantive expertise to be one of the factors in assessing a candidate's overall ability. There are presently on the Court four judges quite knowledgeable in intellectual property and several judges quite knowledgeable in taxes. None of the current judges has a previous background in contracts, trade, just compensation, or civilian and military personnel; yet these areas constitute a large part of the Court's jurisdiction. This does not bother us because we have found that an able and objective judge without substantive expertise in the area renders as high or higher quality of justice on the record before him than a judge with substantive expertise in the area. When one looks back at the great Justices of the Supreme Court and the judges on the Court of Claims and the Court of Customs and Patent Appeals, you find the "generalist" being among the greatest.

We turn now to Judge Robert Mayer, who is presently a judge on the U. S. Claims Court and whose nomination for the Court of Appeals for the Federal Circuit is now before this Committee. We have carefully examined the qualifications of Judge Mayer and found him to be well qualified for appointment to the Court of Appeals for the Federal Circuit. He possesses the high ability, integrity, and judicial capacity required for this important Court.

Judge Mayer has packed a great deal of experience into his 46 years. He received his Bachelor of Science degree from the United States Military Academy in 1963 and his Juris Doctor degree from the Marshall-Wythe School of Law, The College of William and Mary, in 1971. He also took the graduate course of instructions at the Judge Advocate General's School at the University of Virginia. He served as a law clerk to Judge Butzner, Circuit Judge of the Court of Appeals for the Fourth Circuit. He served as a special assistant to the Chief Justice of the United States, Warren E. Burger. In performing his duties as special assistant to the Chief Justice, he worked in close cooperation with the Chief Justice, the Associate Justices, and the law clerks, and himself performed law clerk duties such as reviewing petitions for certiorari and researching and preparing draft opinions.

While in the military, Judge Mayer had extensive litigation experience in criminal work and some experience in Government procurement. Judge Mayer's initial private practice was as a litigator for McGuire, Woods & Battle in wide-ranging general litigation. His work with Baker & McKenzie was primarily corporate work and some litigation. He also served as Deputy Special Counsel of the United States Merit System Protection Board before being appointed to the U. S. Claims Court in December 1982.

We met Judge Mayer shortly after his appointment to the Claims Court and have been impressed with his judicial qualities. He talks, performs, and lives as a judge should. He has a high intellect and integrity and is devoted to law and the improvement of justice. In addition, he is objective, works hard, and is a nice person.

In sum, Judge Mayer meets our high standards, and we strongly support his confirmation.

We appreciate the opportunity to be of assistance to this Committee and would be pleased to answer any questions. Thank you.

Senator **Metzenbaum**. Mr. Robert C. Kline, president of the American Intellectual Property Law Bar Association.

Mr. **Kline**. Thank you, Mr. Chairman and Senator Thurmond.

I am appearing here as president of the AIPLA, which is an association of more than 5,400 lawyers engaged in the practice of all aspects of the law relating to intellectual property.

Since you have indicated that our written statement will be entered in the record, I will keep my oral remarks brief and will of course be prepared to answer any questions.

Mr. Wallick has already commented on the Court of Appeals of the Federal Circuit and the wide diversity of the cases that they have.

As you know, the CAFC has exclusive jurisdiction over appeals in patent infringement cases, which originate in any of the Federal district courts throughout the country. We believe that the Federal Circuit has indeed made great progress in fulfilling its mission of providing uniformity and therefore greater predictability to the decisional law of patents in a number of substantive areas. This, we believe, has been very positive for the intellectual property system of the United States.

Mr. Chairman, your inquiry today relates to the general topic of nominees to the Federal Circuit and the background, experience and other characteristics your committee should consider in carrying out its advice and consent responsibilities. AIPLA believes the CAFC has performed well to date, and this is a direct result of the exceptionally high caliber of their judges. In addition, we feel that the chief judge, as the saying goes, was the right man in the right place at the right time.

Chief Judge Markey was and is the ideal person to lead this unique court in its formative years in order to fulfill the intent of Congress that was set forth in creating the court. As a result, the Federal circuit will, in our opinion, continue to improve the administration of the patent law.

The judges on the court definitely play a critical role in the court's future. The key to success of any court lies in the quality of the judges on the bench.

As to the qualification for the nominees to the Federal Circuit, we believe they should possess a high degree of legal competence, personal integrity, maturity, and judicial temperament. Indeed, we think you should be looking for the same qualities that your committee is looking for in nominees for any of the appellate benches.

Also our association feels strongly that the court should always have a certain percentage of judges who have specialized in the practice of patent law. The reason for this is the exclusive jurisdiction the court has over appeals in patent cases, and the estimate that these appeals take up over 50 percent of the time of the judges.

Patent cases involve technology. Nominees who have specialized in the practice of patent law will have a background in one of the physical sciences or engineering. We do not urge, however, that otherwise qualified nominees be rejected because they lack this professional experience.

However, acceptance of the concept by your committee of always having a certain percentage of judges on the court who have specialized in the practice of patent law will assist in achieving that objective.

As to Mr. Mayer, I cannot elaborate any further than Mr. Wallick has already spoken but to say that our Association endorses his comments and the nomination of Mr. Mayer wholeheartedly.

Mr. Chairman, I will be happy to answer any questions you may have.

Senator METZENBAUM. Thank you very much, Mr. Kline.

[Statement follows:]

STATEMENT OF

ROBERT C. KLINE, PRESIDENT

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

The American Intellectual Property Law Association (AIPLA) is a national bar association comprised of more than 5,400 lawyers engaged in the practice of patent, trademark, copyright and other laws relating to intellectual property.

It is an honor and privilege for me both as a practicing attorney and as President of AIPLA to be invited to testify today before this Committee which has the responsibility of preserving and improving the judicial system of the United States.

We are pleased to offer the Committee our views on the experience and qualifications the Committee should consider in evaluating nominees for the Court of Appeals for the Federal Circuit, as well as our general comments on how the court has performed since being established in 1982.

The Performance of the Federal Circuit

The Federal Circuit was created by Public Law 97-164 and began to operate in October 1, 1982. This Committee in Senate Report 97-275 explained that the purpose of establishing this court was

> to fill a void in the judicial system by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity; to improve the administration of the patent law by centralizing appeals in patent cases; and to provide an upgraded and better organized trial forum for government claims cases.

As the Committee knows, the jurisdiction of the court is defined in terms of subject matter rather than by geography. That range of subject matter is broad and includes appeals in suits against the government, appeals from the Court of International Trade, the International Trade Commission, the Merit System Protection Board and other statutorily defined agency decisions.

The court also has jurisdiction over all appeals from district court decisions involving the patent law when the jurisdiction of the district court is based in whole or part on Section 1338 of Title 28. The court also hears all appeals from the Patent and Trademark Office.

The broad jurisdiction of the court makes it clear that the CAFC is not a "patent appeals court". However, the court does decide virtually all appealed cases which involve the patent law. Therefore, the importance of the court to the application and development of patent law is obviously very significant.

A birdseye view of Federal Circuit statistics shows that both the caseload and output is increasing. Appeals from the Merit System Protection Board (MSPB) dominate numerically. Over the past three years (1984, 1985, 1986) 2,744 of these appeals were docketed and 2,280 were terminated by decision or withdrawal. The complexity and judge time spent per case is significantly less than all other cases. The caseload, minus MSPB, was 602 cases docketed in 1984, 675 in 1985 and 618 in 1986. Cases terminated were 584 in 1984, 585 in 1985 and 624 in 1986.

The statistics show that the court is keeping pace with filings. Chief Judge Markey reports that since its inception the average time from case filing to disposal has remained at approximately 7 months on average.

The statistics as to patent cases show that 293 were docketed in 1984, 292 in 1985, and 339 in 1986. In addition a small percentage of appeals from the Court of Claims and the International Trade Commission involve cases with patent issues. Therefore, roughly 50% of all filings minus MSPB appeals are patent cases. Patent cases terminated were 288 in 1984, 171 in 1985, and 313 in 1986. This reflects that the high overall efficiency of the court applies equally to patent appeals which are clearly the most complex and time consuming cases within the courts jurisdiction. One circuit judge has estimated that approximately 50% of the total work time of the court is devoted to patent appeals.

We believe that the decisions of the court in patent appeals, taken as a whole, have been beneficial to both the application and development of the patent law. Without question, the inconsistent application of the law by the regional circuits has been eliminated. Achieving more predictable results in disputes over patent rights is a significant benefit to the patent system. "Forum shopping" in patent litigation so common before the Federal Circuit and expensive to the parties has also been eliminated.

In sum, in our opinion, the Federal Circuit has performed efficiently and effectively as to patent appeals over the past four and one half years. For a more detailed assessment of the court's decisions in patent appeals, I refer the Committee to "The United States Court of Appeals for the Federal Circuit-Its' First Three Years", AIPLA Quarterly Journal, Volume 13, Nos. 3 and 4 (1985). We have provided this Journal to the Committee counsel.

Qualifications of Nominees for the Federal Circuit

This Committee played an instrumental role in creating the Federal Circuit. As many of us remember, a considerable amount of controversy was involved. Critics argued that specialized appeals courts would stifle the growth and vitality of bodies of law within their sole jurisdiction. They maintained that the development of law through the interplay of disparate views of different regional circuits and multiple panels within circuits subject to ultimate clarification by the Supreme Court was a proven success which should not be tampered with.

The Federal Circuit is a unique court. We are certain this Committee shares our hope that the court will continue to be a successful new approach to federal judicial administration. The key to success for any court, and certainly the Federal Circuit, lies in the quality of the judges on the bench. Therefore, this Committee in passing on nominees for the court will continue to play a critical role in its' future.

This Committee requires that all nominees for judicial appointment demonstrate that they possess a high degree of legal competence, personal integrity, and the maturity and temperament necessary to be a successful judge. Courts of Appeals provide guidance on law and practice to district courts. Therefore, nominees for appellate courts should possess a very high degree of legal competence as well as scholarship in the law and the ability to write with clarity, conviction and insight.

We believe that it is imperative that nominees for the Federal Circuit fully meet the same high standards of personal and professional qualifications as are required of nominees for the other courts of appeals. We urge the Committee not to allow this fundamental principle to be breached or weakened. The fact that the court is "specialized" and has a unique jurisdictionial foundation is not relevant to the qualification of nominees to it. What is highly relevant, is that the court cannot be successful in the long run without having the highest caliber of sitting judges as can be possibility be obtained.

We also recommend for the consideration of the Committee the strongly held view of AIPLA that the court will benefit from always having a certain number of circuit judges who specialized in the practice of patent law. We have and will continue to press this view on the Executive Branch. We do not recommend that otherwise qualified nominees be rejected because they lack this professional experience. However, the general acceptance of this position by the Committee will assist in achieving it.

As we know, the Federal Circuit has a critical responsibility regarding the patent law and devotes a substantial amount of time to meet it. The patent law and the administrative practice of the Patent and Trademark Office are complex. Patent related litigation is likewise complex. However, the real problem lies in applying the law to very difficult factual situations involving advanced developments in technology such as chemistry or electronics.

In judging the validity of a patent, the district court must decide whether the invention in question was "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains". (35 USC 103). If the invention is chemical in nature, the court must exercise the judgment of a skilled chemist. The litigation will involve considerable expert testimony in chemistry on both sides of the issue. While the Federal Circuit does not redecide questions of fact, it must understand the facts underlying the appeal. A panel of the Federal Circuit does not have the full benefit of the educational trial process, but must operate on briefs, the record from below, and brief oral arguments. For judges who do not have an educational background in the physical sciences, these cases present a very difficult challenge.

Virtually all patent practitioners have college degrees in chemical, mechanical, or electrical engineering or degrees in the physical sciences. All have spent a professional career in applying the patent law to inventions which fall within their field of expertise. Currently Chief Judge Markey, and Circuit Judges Rich and Newman were patent lawyers before beginning service on the court. We believe that common sense argues persuasively that nominees with this type of background and experience are particularly valuable to the Federal Circuit.

We have two final issues and comments to offer. Section 102 (b) of P.L. 97-164 requires that each judge in active service on the Federal Circuit reside within fifty miles of the District of Columbia. Neither the Supreme Court nor any of the regional circuit courts has a residency restriction tied to the headquarters of the court. Candidates for the Federal Circuit must agree to relocate to the Washington area if he or she resides elsewhere. This unique requirement, especially for a court with national jurisdiction, has the potential to deter otherwise willing and qualified candidates. If, over time, this rule does prove to be a problem, the Committee should consider modifying or abolishing it.

A number of bills are pending in the 100th Congress which, if enacted, would add new categories of appealable cases to the jurisdiction of the Federal Circuit. One bill, which was also introduced in the 99th Congress, would give the court jurisdiction over appeals from Social Security Administration decisions. We are certain the Committee would very carefully evaluate the effect of adding to the Federal Circuits' workload at this time.

We confess to a biased perspective in that the court is now handling patent appeals in an expeditious manner which we want to continue. However, the fact is that the court is relatively new and we believe should be allowed more time to become established and to prove the premise that specialized appellate courts have a place in the Federal judicial system.

This completes our statement. I thank the Committee again for the opportunity to appear here today.

Senator **Metzenbaum**. Mr. Frederick L. Ikenson, chairman of the Customs and International Trade Bar Association.

Mr. **Ikenson**. Thank you, Mr. Chairman, Senator Thurmond.

I am the chairman of the Judicial Selection Committee of the Customs and International Trade Bar Association. The president of our Bar Association would have testified today, but he was required to be out of the country and could not attend.

Our association is a national bar association, well over a half-century old, whose members regularly practice before the Court of International Trade in New York, and its appellate court, the Court of Appeals for the Federal Circuit, here in Washington.

Our members are vitally concerned with the nominees to these courts, and in fact, we endeavor to perform two distinct functions with respect to judicial appointments. One, from time to time, we recommend for the consideration of the executive branch persons believed by us to be qualified and experienced in international trade law. Two, we endeavor to evaluate the executive's nominees and to provide our evaluation to your committee.

With regard to this evaluation function which we have performed in the case of Judge Mayer, I would make two points. First, as to Judge Mayer's qualification, the president of our bar association has already written to Chairman Biden, advising that our board of directors is unanimously of the opinion that Judge Mayer is well-qualified for this appointment. That opinion was based on the careful and thorough review of information which was available to us.

As is obvious from our evaluation, we welcome and encourage Judge Mayer's confirmation.

The second point I would like to make deals not so much with Judge Mayer, but with the process which we utilize in evaluating candidates. We attempt to interview judicial candidates, and we attempt to collect and review information regarding them in a timely manner to assist this committee and so as not to delay the confirmation process. We rely in large part on a questionnaire, which we believe imposes what is at most a modest burden on the respondent, but which is designed to provide us with highly useful information. We have submitted a copy of that questionnaire for the record with our prepared testimony.

Regrettably, the Department of Justice has consistently declined to provide us with the names of its judicial nominees at the time that it provides them to the American Bar Association, and moreover, it has consistently discouraged its nominees from providing us with a response to our questionnaire.

While Judge Mayer was cooperative with us and most cordial, he, understandably, was reluctant to respond to our questionnaire, given the Justice Department's counsel. We in fact had to rely on his public response to your committee's questionnaire, which response was made available to us only a short while ago.

With due respect, we believe that the executive branch's desire to spare its judicial candidates some inconvenience does not justify its advice regarding our bar association's inquiries. We genuinely believe that because of the knowledge, experience and interest of our members, we are capable of providing your committee with valuable assistance in its effort to determine whether to recommend confirmation of nominees to those courts empowered to decide international trade controversies.

Under the circumstances, if your committee agrees that it stands to be aided by our evaluations, we would ask you to so advise the Justice Department and to invite it to remove impediments to our work in assisting you.

Thank you.

[Statement follows:]

STATEMENT OF FREDERICK L. IKENSON, CHAIRMAN, JUDICIAL SELECTION COMMITTEE, CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION, ON THE NOMINATION OF JUDGE HALDANE ROBERT MAYER TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

My name is Frederick L. Ikenson and I appear to comment on the nomination of Haldane Robert Mayer for appointment as Judge of the United States Court of Appeals for the Federal Circuit.

I am the Chairman of the Judicial Selection Committee of the Customs and International Trade Bar Association. The President of our bar association would have testified at this hearing, but a prior professional commitment required him to be out of the country today.

Our Association is a national bar association, well over a half-century old, whose members regularly practice before the Court of International Trade and its appellate court, the Court of Appeals for the Federal Circuit. It is not difficult to understand that our members are vitally concerned with the nominees to these courts and, in fact, we perform two related but distinct functions with respect to judicial appointments. *One*, from time to time, we recommend, for the consideration of the Executive Branch, persons believed by us to be qualified and experienced in international trade law. *Two*, we endeavor to evaluate the Executive's nominees and to provide our evaluation to your Committee.

With regard to our carrying out the evaluation function, I would like to take this occasion to make two brief points. *First*, as to the qualifications of Judge Mayer, the President of our bar association has already written to the Chairman of your Committee advising that "[o]ur Board of Directors is unanimously of the opinion that Judge Mayer is 'Well Qualified' for this appointment." That opinion was based on the careful and thorough review of information which was available to us. As is obvious from our evaluation, we welcome and encourage Judge Mayer's confirmation.

Second, and notwithstanding our opinion on the nominee's qualifications, we feel obligated to inform you that our evaluation process continues to be encumbered by the Executive Branch's failure to cooperate with us. In carrying out our evaluation function, we attempt to interview judicial candidates and to collect and review relevant information regarding them — all in a timely manner so as not to delay the confirmation process. In part, we rely on a questionnaire, which we believe imposes what is at most a modest burden on the respondent but which is designed to provide us with highly useful information. A copy of our currently used questionnaire for candidates for both the Court of International Trade and the Court of Appeals for the Federal Circuit is attached.

Regrettably, the Justice Department has consistently declined to provide us with the names of its judicial nominees at the time that it provides them to the American Bar Association, and, moreover, it has consistently discouraged its nominees from providing us with a response to our questionnaire. While Judge Mayer was cooperative with us and most cordial, he, understandably, was reluctant to respond to our questionnaire, given the Justice Department's counsel. We in fact had to rely on his public response to your Committee's questionnaire, which response was made available to us slightly over a month ago.

With due respect, we believe that the Executive's desire to spare its judicial candidates some inconvenience does not justify its advice regarding our bar association's inquiries. We genuinely believe that because of the knowledge, experience, and interest of our members, we are capable of providing your Committee with valuable assistance in its effort to determine whether to recommend confirmation of nominees to those courts empowered to decide international trade controversies. Under the circumstances, if you agree that you stand to be aided by our evaluations, we would ask that you so advise the Justice Department, inviting it to remove impediments to our work and, indeed, to cooperate with us in this important function.

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

Questionnaire for Candidates for the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit

1. Please provide the Judicial Selection Committee with a copy of the questionnaire responses and data (include any writing samples, briefs, opinions or other documents) furnished by you to any other bar association in connection with the nomination under review, together with a copy of the questions to which you were responding.

2. Please identify any bar association, professional organization, trade association or other organization which you believe supports your judicial appointment.

3. Describe any significant community activities in which you have been involved during the past ten years.

4. Have you had any teaching or lecture experience? If so, briefly describe details.

5. Have you ever been a member of a committee of a bar association whose subject matter related to customs or international trade? If so, please list such committees, a brief description of your activities and whether you held any official positions on the committee(s).

6. Describe any litigated matters which you either personally handled or were involved in which related to customs or international trade law. Give citations if such cases in which you were involved were reported. (If more than five cases, limit your answers to the five most significant).

7. Describe any administrative matters which you either personally handled or were involved in that dealt with customs or international trade law. Please give a capsule summary of the substance of such matters and what you believe to be their particular significance.

8. Have you ever held any public office, elective or otherwise, that dealt with matters relating to customs or international trade law? If so, please briefly state details of the function of the office and your responsibilities with respect thereto.

9. Have you ever been an officer, director or otherwise engaged in a management position in any business or enterprise which, to a significant extent, involved customs or international trade? If so, briefly give the details of the nature of the business with respect to its trade aspects.

PLEASE REPLY TO: Frederick L. Ikenson, Chairman, Judicial Selection Committee,
1875 Connecticut Avenue, N.W., Washington, D.C. 20009

10. If you have authored or co-authored any books, articles, briefs or legal writings dealing with customs or international trade, please furnish copies.

11. State any other information or experience you have had in the public or private sector including organizations, professional associations, etc., relating to customs or international trade.

12. During the past ten years, have you or any immediate family member been involved in customs or international trade matters (other than ordinary matters related to personal travel) or with U.S. industry substantially affected by international trade? If so, please describe briefly.

13. Have you ever been involved as an advocate or lobbyist in connection with any customs or international trade matter? If so, please describe briefly.

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION
475 PARK AVENUE SOUTH
NEW YORK, N.Y. 10016
(212) 725-0200

DAVID O. ELLIOTT
PRESIDENT

JUDICIARY COMMITTEE
RECEIVED MAY 21 1987

RECEIVED MAY 12 1987

May 5, 1987

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: HALDANE ROBERT MAYER
United States Court of Appeals for the Federal Circuit

Dear Senator Biden:

The purpose of this letter is to inform you of the opinion of the Board of Directors of the Customs and International Trade Bar Association pertaining to the nomination of Haldane Robert Mayer for appointment as Judge of the United States Court of Appeals for the Federal Circuit.

Our Board of Directors is unanimously of the opinion that Judge Mayer is "Well Qualified" for this appointment.

Sincerely,

David O. Elliott

David O. Elliott, President
Customs and International Trade
Bar Association

DOE/pf

PLEASE REPLY TO:

Senator METZENBAUM. Thank you, Mr. Ikenson.

I think there is some merit to the point you make although I must tell you I have some ambivalence as to the proper way to resolve it. I know some of us have been concerned as to why the National Bar Association, which I believe is the association of black attorneys in this country, why the Federal Bar Association, why other bar associations have not been included in the process and why only the American Bar Association is the one that is given the prerogative of making the evaluation.

I think it is a fair question that you raise, and I believe that the Judiciary Committee will, in the not too distant future, have an opportunity to discuss that subject among ourselves as to whether just looking at the American Bar Association is sufficient. I have heard some very prominent members of the Committee say that they themselves do not have much respect for the American Bar Association. That is not the position of this Chairman of this particular hearing. But the point is I think you raise a valid question and particularly I can see a number of reasons why the base ought to be broadened.

On the other hand, I can see the other alternative, and that is how far do we go and to what extent, and are there any limits as to the number of bar associations that we take into account.

Would your involvement in the evaluation process, in your opinion, be burdensome?

Mr. IKENSON. In our opinion, it would not be burdensome, Mr. Chairman, for a number of reasons. First, we are mindful of the obligations of judicial candidates to respond to inquiries of various bar groups and particularly the American Bar Association and also other investigative bodies such as the Federal Bureau of Investigation.

Therefore we have tailored our questionnaire to be free of unnecessary burden, we believe. The primary question asks the nominee to make available to us a copy of his response to the American Bar Association's questionnaire. And then there were a few other questions dealing with the candidate's experience, and the reason we ask these questions is in part to see whether there is potential for conflict of interest.

Senator METZENBAUM. Thank you very much.

As I understand, Mr. Devine is the next witness, and Mr. Roth is accompanying Mr. Devine; is that correct?

Mr. DEVINE. Yes, sir.

Senator METZENBAUM. We will be happy to hear from you, Mr. Devine.

Mr. DEVINE. Thank you for inviting the testimony of the American Federation of Government Employees and the Government Accountability Project on the nomination of H. Robert Mayer to the U.S. Court of Appeals for the Federal Circuit.

AFGE is the largest Federal employees union, and GAP is the legal support organization for whistleblowers—those employees who challenge illegality where they work.

My name is Thomas Devine. I am the Legal Director of GAP. On my right is AFGE General Counsel Mark Roth. I will summarize our prepared statement.

In the past, our groups have jointly defended free speech and merit system rights when we perceived a serious threat. And without leadership today by this Committee, we view this nomination in that light.

The Federal Circuit has a monopoly on civil service appeals from the Merit Systems Protection Board. If confirmed, Mr. Mayer will be the first judge on that court with prior experience in Federal personnel law. He justifiably would receive deference from the other judges and could be the most influential jurist in the Nation for purpose of judicial review of civil service law.

This is what particularly concerns us—the roots from which he will draw and hostility to free speech rights that he could institutionalize on that court with a lifetime appointment.

Mr. Mayer served as Deputy Special Counsel to Mr. Alex Kozinski and later as Acting Special Counsel. Under Messrs. Kozinski and Mayer, the Office of the Special Counsel was so severely discredited that Representative Schroeder, an original champion of its creation, proposed its abolition. And the Senate was so concerned that in 1985 this Committee held two hearings, and 43 Senators opposed Mr. Kozinski's nomination to the Ninth Circuit Court of Appeals.

In part, the opposition was due to the OSC's non-record of service during the Kozinski-Mayer years. To illustrate, during 1980, before their arrival, there were five corrective action recommendations against illegal reprisals. There was one during their term. In 1980 there were four disciplinary complaints to punish managers for alleged retaliation. There were none during their term. In 1980, there were 20 stay requests for temporary injunctions of reprisal. There were four during their term.

On balance, during Mr. Mayer's term, the OSC closed the cases on over 2,500 employees who sought help, without filing a single corrective action complaint for a hearing to restore an aggrieved employee's job.

If the track record were merely a zero, our concerns would not be as severe. Unfortunately, the Kozinski-Mayer policy shifts so effectively undercut free speech protection that whistleblowers charged the Special Counsel's responses to their cases actually reinforced merit system abuses, and leading members of the Federal bar stated that they stopped bringing cases to the OSC, simply because as a general rule, it was contrary to their clients' best interest to try to seek help there.

The illegality was so crude during those years that OSC employees themselves became whistleblowers, and approximately 70 percent of the substantive headquarters staff resigned.

We conducted an investigation into Mr. Mayer's personal role in compiling this record, and based on our research, we believe that the nominee's personal conduct in the following specific areas needs to be considered.

The first and main point that I will detail involves off-the-books funds transfers. During Mr. Mayer's tenure at OSC, it appears that illegal fund diversions from the OSC to the Merit Board occurred. The source of the charges is Mr. Fred Hollingsworth, who was then the administrative director for the office. He raised the issue in the second Kozinski confirmation hearing, although it was not discussed in depth, and his two 1985 affidavits are attached to my testimony.

[NOTE: Hollingsworth affidavits are in committee files.]

According to records at the time, OSC loaned the board the money to purchase a new kitchenette, office furniture, recording equipment, a computer, a copier, a microwave oven, a Mr. Coffee machine, and similar items.

The loans occurred while the OSC asserted it was too financially strapped to fund long-overdue functions, such as conducting investigations.

We wonder how many employee reprisal cases could have been investigated for the approximately $200,000 that was involved. I inquired whether Mr. Mayer was aware of the loans, and Mr. Hollingsworth replied that before he took over as Special Counsel, Mr. Mayer was aware, and after he took over, he was in charge of the off-the-books transfers. He added that he attended meetings and budget briefings where another OSC manager briefed Mr. Kozinski, Mayer and others about the loans, and that there was a separate decision to fund each purchase.

The OSC managers discussed the loans as a way of maintaining good relations with the Merit Board and in building solidarity between the OSC and the Board. They stated that these favors were a way of countering any lingering bad relations between the Special Counsel and the Board.

Mr. Hollingsworth questioned about the legality of the fund transfers, but was abruptly told they were entirely proper and not to discuss it further.

Senator METZENBAUM. Would you wind up, Mr. Devine?

Mr. DEVINE. Mr. Mayer never objected or questioned the funds transfers to Mr. Hollingsworth's knowledge, but our legal research indicates that they violate the budget control provisions of 31 U.S.C. 1301, which are quoted in my testimony.

Senator METZENBAUM. Thank you very much.

Mr. DEVINE. Thank you, sir.

[Statement follows:]

TESTIMONY OF
MARK ROTH AND THOMAS DEVINE

for the

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

and the

GOVERNMENT ACCOUNTABILITY PROJECT

on the

NOMINATION OF H. ROBERT MAYER

to the

FEDERAL CIRCUIT COURT OF APPEALS

Mr. Chairman:

Thank you for inviting the testimony of the American Federation of Government Employees (AFGE) and the Government Accountability Project (GAP) on the nomination of H. Robert Mayer to the U.S. Court of Appeals for the Federal Circuit. AFGE is the largest federal employees union. GAP is a non-profit, non-partisan legal support organization for "whistleblowers" -- those employees who challenge illegality or abuses of power, or public health or safety threats where they work. My name is Thomas Devine, and I am the legal director for GAP. This testimony is presented on behalf of both our organizations. In the past, AFGE and GAP have jointly defended the free speech and merit system rights of federal workers when we have perceived a serious threat.

Without close scrutiny by this Committee, we view Mr. Mayer's nomination in that light. The Federal Circuit Court of Appeals has a monopoly on civil service appeals from the Merit Systems Protection Board (MSPB). According to the National Law Journal, if confirmed Mr. Mayer will be the first judge on that court with prior experience in federal personnel law. With this background, he justifiably would receive deference on the court and could be the most influential jurist in the nation, for purposes of judicial review of the Civil Service Reform Act.

That is what particularly concerns our organizations -- the roots of experience from which he will draw, and the apparent hostility to free speech rights that he could institutionalize on that court with his lifetime appointment. Mr. Mayer previously served as Deputy Special Counsel to Mr. Alex Kozinski from June 1981 - August 1982 during the latter's tenure as Special Counsel of the U.S. Merit Systems Protection Board. From August - October 1982 he was the Acting Special Counsel. Under Kozinski and Mayer the Office of the Special Counsel (OSC) was so severely discredited that Representative Patricia Schroeder -- an original champion of its creation -- proposed its abolition. In fact, even Kozinski's successor K. William O'Connor (himself not reputed as a great champion of employee rights) stated on his arrival that credibility had to be restored to the OSC or he would "lead the parade" to abolish the Office. The Senate was so concerned that in 1985 this Committee held two hearings and 43 senators opposed Mr. Kozinski's nomination to the Ninth Circuit Court of Appeals.

In part, the opposition was due to the OSC's non-record of service to the merit system during the Kozinski-Mayer years, in isolation and by comparison with the previous leadership of the office. During 1980 there were five corrective action recommendations against illegal reprisals. There was one during the Kozinski-Mayer term. In 1980 there were four disciplinary complaints to punish managers for retaliation. There were none during the Kozinski-Mayer years. In 1980 there were 20 OSC requests for stays, or temporary injunctions, of alleged reprisals. During the Kozinski-Mayer years there were four. On balance, during Mr. Mayer's term the OSC closed the cases on over 2500 employees who sought help, without filing a single corrective action complaint for a hearing to restore any aggrieved employee's job.

If the track record were merely a zero, our concerns would not be so severe. Unfortunately, Kozinski-Mayer policy shifts so effectively undercut protection of employee rights that whistleblowers have charged the Special Counsel's response to their cases actually reinforced merit system abuses. At the same time, leading members of the federal bar have said they stopped bringing cases to the OSC simply because as a general rule it was contrary to their clients' best interest. To illustrate the abuses, in 1982 the OSC prepared and presented an ambitious modern version of the "Malek-May Manual" used by President Nixon to circumvent civil service laws. The Malek Manual -- initially exposed by the Watergate hearings -- wass a major catalyst for passage of the Civil Service Reform Act. Its rebirth was in the form of a training seminar and manual for federal managers on how to fire an employee without running afoul of OSC reprisal investigations. The course materials were drawn largely from a draft OSC investigations manual. The seminar materials included volumes of appendices containing legal research and models for adverse personnel actions. As one OSC attorney protested, "This is like the FBI putting out a training manual on how to do bank robberies without getting caught. Think how demoralizing this is. Anyone who knows how to read knows how to beat us." On at least one occasion during this period, the OSC even tutored federal managers on how to rewrite their complaint so that a whistleblower firing would not run afoul of free speech precedents.

The illegality was so crude that Kozinski-Mayer OSC employees themselves became whistleblowers, charging both improper responses to cases and serious prohibited personnel practices within the Office. The personnel abuses led to mass resignations, including approximately 70% of the substantive headquarters staff.

In light of this record, we conducted an investigation into Mr. Mayer's personal role in compiling it. Our inquiry involved interviews with five current or former OSC employees, an attorney who dealt with Mayer in a case involving alleged prohibited personnel practices at the OSC, a review of relevant information from the Kozinski file and a review of the first 50 decisions that Judge Mayer authored at the Claims Court. Based on our research, we believe that at a minimum the nominee's personal conduct in the following specific areas needs to be considered.

OFF-THE-BOOKS FUND TRANSFERS

During Mayer's tenure at OSC it appears that off-the-books, illegal diversions of funds from OSC to the MSPB occurred. The source for the allegations is Mr. Fred Hollingsworth, the former OSC Director of Administration and Programs, who raised the issue at the end of the Kozinski confirmation process. Mr. Hollingsworth's two 1985 affidavits to this Committee are enclosed as Attachments 1 and 2.

According to records Hollingsworth prepared at the time, OSC loaned MSPB the money for the Board Chairman to purchase a new kitchenette, office furniture, recording equipment, a computer, a copier, a microwave oven, a Mr. Coffee machine and similar items. The next year MSPB "repaid" the loans in similarly informal transactions. The loans occurred while the OSC asserted that it was too financially strapped to fund long overdue functions, such as intra-city travel costs to interview witnesses and publication of outreach pamphlets that would explain how federal employees could protect their rights. The alleged budget crisis was so severe the General Accounting Office (GAO) reported that during this period the OSC closed cases without interviewing complainants when the initial complaint letter on its face did not make a prima facie case of prohibited personnel practice. How many employee reprisal cases could have been investigated for $200,000?

Since the decisionmaking process behind these loans was not discussed during the Kozinski confirmation, I inquired whether Mayer were aware of the transactions. Hollingsworth replied that before Kozinski's departure Mayer was aware of the transactions; and after Kozinski's departure he was in charge of the off-the-books transfers. Hollingsworth added that he attended meetings and budget briefings where OSC manager William Caldwell briefed Kozinski, Mayer, Hollingsworth and other OSC managers about the loans. Hollingsworth first learned of the loans in May 1982. He added that there was a separate decision to loan funds for each purchase; i.e., the OSC discussed and approved one loan for the MSPB to get a kitchenette, another for a microwave, another decision for a Mr. Coffee, and so on.

The OSC managers besides Hollingsworth discussed the loans as a way of maintaining good relations with the Merit Board and of building unity. They stated that these favors were a way of countering any lingering bad relations between OSC and the Board that might have carried over from the Mary Eastwood days. Further, according to Hollingsworth, Caldwell discussed with the other OSC managers that possibly during the next fiscal year the Board would repay more than had been loaned, and the OSC's budget could therefore expand without higher appropriations.

Hollingsworth questioned Caldwell about the legality of the funds transfers, because he thought they were a blatant violation of budget accountability provisions in Title 31 of the U.S. Code. Caldwell abruptly told him they were entirely proper and not to discuss it further. Mayer never objected or questioned the fund transfers, to Hollingsworth's knowledge. Our legal research, however, indicates that the fund diversion violates the budget control provisions of 31 USC 1301, which requires that "[a]ppropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law." A legal memorandum on the issue is enclosed as Attachment 3.

In addition to possible Title 31 violations, the transfers may have violated the Code of Professional Responsibility, as a vehicle for attorneys to purchase goodwill from the Merit Systems Protection Board members who adjudicate OSC cases. As Disciplinary Rule 8-101(A) provides, "A lawyer who holds public office shall not: (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client." DR 9-101(C) further prohibits attorneys from avoiding even the appearance of impropriety: "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public officials." Depending on purchase order requirements there may have been false statements under 18 USC 1001, if OSC stated that it were purchasing equipment for the Office when in reality it was intended for the Board.

We believe this issue raises serious questions not only that must be resolved about Mr. Mayer's past actions, but about his judgment and future standards for the bench. Having sought, as an attorney, to court favors from those who hear and decide his cases, through illegal fund transfers, Mr. Mayer's character should be very carefully considered. How would he react, for instance, if the Department of Justice offered to loan hundreds of thousands of dollars from its prosecution budget to help refurnish the offices at the Federal Circuit?

GAG ORDERS

At the same time the Special Counsel was taking credit for eliminating gag orders at other agencies, a similar order was issued to a suspected OSC dissenter. In a draft memorandum from Kozinski, OSC public affairs director Laura Chin was ordered not to talk with other OSC employees "unless you have specifically cleared the communication with the relevant field office chief." She resigned shortly after receiving the gag order.

Although Kozinski's name appears on the memorandum, Mayer was the only visible actor in the incident. He began the process by attempting to recruit other OSC staffers to sign the memorandum, instead of Kozinski. One former high-level OSC employee states that he refused. Mayer also implemented the gag order in a meeting with Ms. Chin, and he was the reviewing officer when she resigned in protest.

Again we believe this incident is relevant today, because on the bench Mr. Mayer will be responsible to adjudicate employee challenges to gag orders, or adverse actions against employees for pursuing their right to violate illegal gag orders. In these circumstances, will Mr. Mayer enforce the practices he lived by, or the standards of the Constitution and the Reform Act?

OSC PROHIBITED PERSONNEL PRACTICES

Kozinski assigned Mayer to handle the proposed termination of Mary Eastwood, the previous Special Counsel, for refusing to accept a cross-country reassignment. Her case challenging the termination was successfully settled on terms including provision of attorney fees, which only are awarded to the prevailing party. Although fully aware that the OSC had formally lost, Mayer remained completely silent during Kozinski's 1985 confirmation when the latter falsely stated that Ms. Eastwood had not won her case.

An interview with Ms. Eastwood's former attorney helps illustrate Mayer's behavior during this incident. The negotiations extended all night, because Ms. Eastwood would not settle without achieving formal recognition of victory. At 5:30 A.M. Mr. Mayer "screamed" at Eastwood's lawyer for insisting on proper documentation of her victory, which was required under the Back Pay Act to receive attorney fees. Eastwood's attorney added that during the negotiations Kozinski and Mayer closeted themselves separately from the other two OSC staffers working on the settlement. During the negotiations Mayer served as Kozinski's emissary, going back and forth for separate meetings with the latter. On balance, Eastwood's attorney characterized Mayer's behavior during the incident as "spiteful and small." Despite the settlement, Mayer did not pay the attorney fees. They remained unpaid until Mr. O'Connor's arrival many months later.

PERFORMANCE COUNSELING

Mayer's activities were not limited to Eastwood and Chin. Fred Hollingsworth had served as OSC administrative director under Eastwood. After Kozinski's arrival, however, Mr. Caldwell was detailed to OSC from the Energy Department, supposedly to help with the transition. Since in practice he was assuming Hollingsworth's duties, however, the latter began asking questions about where he stood. During Mayer's first month on the job, he called Hollingsworth in for a meeting. Mayer announced that he knew Hollingsworth was asking questions, and that Caldwell was merely on detail temporarily to help out.

Mayer then got to the point. He told Hollingsworth that he had reason to believe the latter was not performing his job properly. Mayer then informed Hollingsworth that "we" can fire him "whenever we want to." Mayer added that he knew Hollingsworth had 20 years of personnel experience and thought he knew a lot about civil service rules and regulations. But, Mayer concluded, "You can be fired. If anyone can do it, we can."

Hollingsworth recalls that he responded he was not sure why Mayer was saying this. Hollingsworth explained that he just wondered what his responsibilities were, since a new man had been brought on who had most of his duties, and now there was talk about him being fired.

Hollingsworth does not recall any explanation of alleged performance deficiencies. As he remembers, Mayer merely responded, "I just want you to understand. That's the way it's going to be." Hollingsworth recalled the tone of the meeting as heavy-handed and hard line.

This incident is particularly significant for the nomination, because as a judge Mr. Mayer may hear more appeals on performance-based personnel actions than any other issue. The law requires a constructive management approach to help employees improve their performance, and prohibits taking or threatening to take personnel actions without first counseling and helping train the employee to improve. By contrast, Mr. Mayer did not even disclose the nature of alleged performance shortcoming. He merely threatened Hollingsworth without explanation other than a reference to the latter's questions about job status. Since an agency must only prove performance-based personnel actions through the minimal substantial evidence standard, it will take extreme judicial sensitivity to the accompanying procedural rights and legislative intent to keep the Executive branch honest in administering this law. Based on his actions at the OSC, we question whether Mr. Mayer has that commitment.

REASSIGNMENTS/TRANSFERS

Mr. Hollingsworth recounted a similar incident around September 1982, while Mayer served as Acting Special Counsel. Although Kozinski was gone, there had been persistent rumors that he wanted to get rid of five employees. In September Mayer signed a memorandum transferring all five to the new "D.C. field office" for the OSC, which was across the street from the Special Counsel's main headquarters. The move was perceived as a way of separating disfavored employees from the main activities of the Office. As part of the reassignment, Hollingsworth's job was changed from administrative director to supervisory investigator.

Hollingsworth asked Mayer the reason for the reassignment and was informed that "[y]our services can best be utilized there." Mayer added that he didn't have to explain, because it is a management perogative to reassign an employee within the same geographical area. Mr. Hollingsworth resigned shortly afterward.

While retaliatory reassignments are prohibited personnel practices, they are extremely difficult to challenge because of longstanding case law that these actions are a management perogative. As a result, fairly adjudicating employee rights again will take a firmly demonstrated commitment to merit system principles. Mr. Mayer's OSC record as described does not demonstrate that commitment. Will he accept behavior by other federal managers that mirrors his own "It's none of your business" approoach to an employee concerned about having his career redirected?

CLAIMS COURT DECISIONS

GAP's General Counsel, retired Administrative Law Judge Joseph Kennedy, prepared an analysis of Judge Mayer's record on the Claims Court. On balance his decisions have been consistently pro-government (42/50) and non-controversial (only three reversed in whole or in part so far, with another apparently erroneous decision on appeal). Since the record was almost totally devoid of decisions involving federal personnel law or employees' constitutional rights, we do not believe his service at the Claims Court either relieves or intensifies our concerns.

On balance, our organizations believe that the Mayer nomination requires extreme scrutiny, because it is for a particularly significant seat on the bench. Without this Committee's leadership in the advice and consent process, we fear that his confirmation could lead to a lifetime revival of the Kozinski-Mayer "reign of terror" -- this time from the court with a monopoly of federal employee appeals. That result would be disastrous for the merit system.

20808

Senator METZENBAUM. The issue before the Judiciary Committee, Mr. Devine, is whether Mr. Mayer will be a fair and objective judge at the Court of Appeals for the Federal Circuit, and there may be some questions about his record in the Office of the Special Counsel. But the question is will he as a jurist be fair and capable and objective?

Mr. DEVINE. Mr. Senator, I cannot challenge Mr. Mayer's personal integrity or objectivity as a jurist. What is essential, however, is that he respects the standards written into the statutes and the constitutions when he evaluates the challenges to activities of Federal managers, rather than that he adopts the standards that he exercised himself as a Federal manager. And if he judges others by the standards that he lived, I think we are in big trouble on this court.

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. I just want to thank the witnesses for appearing here today. We appreciate your comments. I do not think anything has been brought out against Judge Mayer; in fact, you highly recommend him, I believe—that is your record, isn't it?

Mr. WALLICK. Yes, sir.

Senator THURMOND. That is all, Mr. Chairman.

Senator METZENBAUM. Well, I gather that they highly recommend him.

Do you have a position, does your organization have a position, Mr. Devine?

Mr. DEVINE. I can only speak for GAP, not for the AFGE, and our organization neither supports nor opposes specific nominations. We just try to raise the issues we think are significant.

Senator METZENBAUM. We thank you very much, and your comments have all been very helpful.

This hearing stands adjourned.

[Whereupon, at 4:10 p.m., the committee was adjourned.]

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May 18, 1987

The Honorable Joseph R. Biden, Jr.
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing on behalf of Intellectual Property Owners, Inc. (IPO) concerning the Court of Appeals for the Federal Circuit. We understand the Committee held a hearing on May 13, 1987 at which issues involving the Federal Circuit were discussed. We would like to express our views concerning appointments to that court.

IPO is a nonprofit association whose members own patents, trademarks and copyrights. Our members include large corporations, small businesses, universities, and individuals. IPO members are responsible for a significant portion of the research and development conducted in the United States. Because of the importance of patents in encouraging research and development, we are deeply interested in having the patent system operate effectively.

The Court of Appeals for the Federal Circuit, of course, has exclusive jurisdiction over patent appeals from district courts throughout the United States. The central purpose for establishment of the Federal Circuit in 1982 was to provide uniformity and predictability in decisions in patent cases. The concept for the Federal Circuit originated in the Department of Justice, but the legislation received vigorous support from industry. Indeed, after the legislation was enacted, a former Justice Department official published an article about the Federal Circuit entitled "The Court American Business Wanted and Got."

We believe very strongly that the court can fully achieve its objective of returning uniformity and predictability to patent law only if its judges possess the necessary abilities and experience. We want to bring to your attention the qualifications that we think are essential.

It goes without saying that any appointee to the Federal Circuit or any other court should be an individual of the highest integrity and intellect. Appointees should be lawyers

A NONPROFIT ASSOCIATION REPRESENTING PATENT, TRADEMARK AND COPYRIGHT OWNERS

who command respect in the profession for their record of achievement, their knowledge of the law, their breadth of vision, and their sense of fairness and good judgment.

In addition to such basic qualities, we believe it is also important for at least several of the appointees to the Federal Circuit to possess experience in patent law and technology. Currently only three of the twelve positions on the court are filled by individuals who were experienced in patent law and technology at the time of appointment. Given that at least half of the workload of the Federal Circuit is patent cases, it seems reasonable that at least half of the twelve judges should have experience in the field.

In order to decide whether an invention is patentable, a judge must put himself or herself in a position of a person skilled in the field of the invention. The field can be modern chemistry, biotechnology, computer science, or other sophisticated technologies. Education of judges by counsel and law clerks in each case is not a complete substitute for having worked with technology for years. On the whole judges who have substantial experience with patent law and technology make more predictable decisions in patent cases than those who do not have such experience.

We also wish to stress that experience as an in-house patent lawyer is valuable experience for prospective appointees to the Federal Circuit. About half of the 12,000 registered patent attorneys in the United States are employed within companies. A majority of IPO's members are companies which employ significant numbers of patent lawyers in their legal or patent departments.

Many talented patent lawyers employed by companies do not possess trial experience, but trial experience is not an essential qualification for an appellate judge. Corporate lawyers without trial experience often have talents and temperament that make them excellent candidates for the Federal Circuit. Individuals in corporate patent departments often have extensive knowledge of technology, excellent writing ability, and a keen appreciation of the need to reduce the expense and complexity of Federal court litigation. Corporate patent lawyers who make their interest known in being appointed to the Federal Circuit should be given careful consideration.

We urge the Committee to encourage appointment of the best qualified people available for vacancies on the Federal Circuit. The Federal Circuit is in a position to help restore - or to detract from - America's technological leadership.

We hope this letter can be included in the hearing record.

Sincerely,

Donald W. Banner

Donald W. Banner
President

cc: Hon. Howard M. Metzenbaum
Hon. Patrick J. Leahy

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
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June 2, 1987

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Senator Howard M. Metzenbaum
United States Senate
Committee on the Judiciary
Washington, DC 20510

Re: Court of Appeals for the
Federal Circuit

Dear Senator Metzenbaum:

Thank you for forwarding additional questions relating to the Federal Circuit. AIPLA is very pleased to offer any assistance the Committee may desire. The answers to the questions you have follow:

1. What mechanisms does your association use to evaluate nominees to the Federal Circuit? What is the composition of your screening committee? How are the members chosen? To whom do they report?

The Association has a Committee on Public Appointments. The committee consists of a chair and not less then ten nor more than twenty members chosen by geographical distribution. The committee is made up of senior members of the bar. The members are appointed yearly by the President-Elect and ratified by the Board of Directors of the Association. The committee reports to the Board.

2. **What are the principal sources of information on which you rely in your evaluations of judicial nominees? For example, do you solicit the nominee's response to a questionnaire? Do you conduct interviews of the nominee? How do you identify persons who may have information about the nominee's fitness?**

The committee requests biographical data and a resume of professional experience from candidates. This information is supplemented by interviews of persons who have direct experience with the candidate such as partners or co-workers, opponents in litigation, and

Formerly AMERICAN PATENT LAW ASSOCIATION (APLA)

clients. If the committee determines it necessary, interviews with candidates are conducted.

3. When and how did your association first learn of Judge Mayer's nomination to the Federal Circuit? When did you begin your evaluation process?

Our Association became aware of Judge Mayer's potential nomination for the Federal Circuit in May of 1986. At that point in time, Judge Mayer had been selected by the President and was being investigated by the FBI. The fact that he was a potential nominee became common knowledge in bar circles. AIPLA was not notified of Judge Mayer's selection in any formal manner.

4. Does your organization routinely learn of Federal Circuit nominations before they are formally made? If so, do you think this helps your organization to conduct a thorough and informative evaluation of the candidate? If not, do you think that your group could make a more meaningful contribution to the nominations process if it received earlier notice of potential nominations?

The AIPLA does not routinely learn of Federal Circuit nominations before they are formally made. If we did receive early notice of potential nominees, we believe we could make a meaningful contribution. If the potential nominee is a lawyer who practiced intellectual property law, AIPLA is in an excellent position to fully evaluate that candidate's fitness to serve on the Federal Circuit.

5. The American Bar Association investigates every nominee to the Federal Circuit, as well as to other federal judicial posts. Why isn't the ABA investigation, and the resulting evaluation, sufficient to inform the Judiciary Committee of the bar's view on each nominee to the Federal Circuit?

AIPLA does not have sufficient information on the quality of the American Bar Association investigations to have an opinion on whether those efforts meet the Judiciary Committee needs. However, it seems clear that the Committee would benefit from receiving more information on nominees from the bar that it currently receives.

AIPLA could provide meaningful assistance to the Committee in considering nominees for the Federal Circuit. First, the Federal Circuit is the only federal court which AIPLA would welcome an active role in assisting the Committee evaluate nominees. This is because of the nature of AIPLA and the unique jurisdiction of the court. Whatever burdens the ABA is shouldering in evaluating all nominees for the federal bench would not affect AIPLA. Second, if the nominee had an intellectual property practice, AIPLA is in an excellent position to gather information about the nominee. The chances are great that the nominee would be well known to the members of the Committee on Public Appointments or at the very least to others well known to that Committee.

6. Do you agree with the view that a nominee who is qualified for appointment to one of the eleven regional circuits is equally qualified for appointment to the Federal Circuit?

AIPLA believes it is essential for the Judiciary Committee to apply the same high personal and professional standards to nominees for the Federal Circuit that are applied to nominees for the regional circuits.

7. It has been asserted that the information provided to the Senate as a result of ABA evaluations of judicial nominees is too brief to significantly help the Senate Judiciary Committee evaluate nominees. Do your organizations prepare most detailed evaluations, and do these evaluations include a discussion of the bases for the evaluations?

We have never seen an evaluation report on judicial nominees prepared by the American Bar Association. Therefore, we have no comment to offer on the length or quality of these reports.

We do know that the ABA Standing Committee on the Judiciary reaches a conclusion on the qualifications of each nominee i.e. "exceptionally well qualified", "well qualified", "qualified", or "not qualified". That ABA Committee has published an explanation of the general criteria considered in reaching those conclusions. This seems like a sound framework for evaluating nominees.

The Judiciary Committee has the responsibility to make its own evaluation of judicial nominees. While the conclusions of the ABA may be useful to have, it seems obvious that the Committee does not and cannot merely adopt the conclusions of the ABA or any other group or individual. What the Committee needs to know to make its own evaluation are relevant facts about the various qualifications of nominees. If AIPLA were to offer the Committee opinions on the worthiness of nominees to serve on the Federal Circuit, our submissions would be formulated with the needs of the Committee firmly in mind.

8. Mr. Kline, has the Justice Department discouraged nominees from cooperating with your investigations?

We have no reason to believe this has occurred.

9. Would it be too burdensome to ask a nominee to make himself available for ABA investigation as well as investigation by other bar associations that may have an interest in the nomination? What steps do you take to insure that your investigation is not burdensome to the nominee?

Any nominee for a federal judicial appointment should be willing, and in fact should welcome, any reasonable inquiry regarding his or her fitness to serve. Any person who aspires to a lifetime appointment to a position of high honor and high responsibility should understand that personal burdens will be involved over the very short period of time involved in the evaluation process. On the other hand, nominees should not be put in a position where they are required to submit to unreasonable, intemperate, or improper requests for information or to make personal efforts involving expense and time that are not necessary.

I can't say what specific steps AIPLA would take to insure that our demands on a nominee would be reasonable and proper. I can only assure the Committee, that AIPLA would be exceedingly careful and circumspect in this regard.

Regards,

Sincerely,

Robert C. Kline

Robert C. Kline
President

RC/cc

cc: Steven J. Metalitz, Esq.

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June 3, 1987

The Honorable Howard M. Metzenbaum
United States Senate
Committee on the Judiciary
Washington, DC 20510

Dear Senator Metzenbaum:

This is in response to your letter of May 26, 1987, concerning our testimony on May 13, 1987, on nominations to the U.S. Court of Appeal to the Federal Circuit, including the pending nomination of Judge H. Robert Mayer. Attached is a copy of one of the issue areas raised concerning the notice of nomination. We will address your other issue areas in a later letter.

Our Association has established a Judicial Selection Committee on which Board of Directors' members serve. The Committee attempts to locate and interest qualified persons in vacancies on the U.S. Court of Appeals for the Federal Circuit, and then the Committee reviews potential nominees. The three member Committee reports at each month's Board meeting to the Board and takes no action without the approval of the Board.

When a vacancy occurs on the Court, the Committee evidences its interest to the Department of Justice and stays involved. The Committee and the Board became aware that Judge Mayer was under consideration well in advance of his selection and nomination by the Administration.

The Committee obtains copies of the responses made by potential nominees to the ABA questionnaire. The Committee and the Board interview potential nominees and talk to as many other people as we can on a confidential basis. The Chairman of the Committee reads publications by those perspective nominees. Because of the diversity of the practice areas represented on our Board, we are able to reach out and form meaningful evaluations.

If we may be of further assistance on this matter, please contact the undersigned.

Sincerely,

Robert D. Wallick

Robert D. Wallick
President

NOTICE OF NOMINATION

When and how did your association first learn of Judge Mayer's nomination to the Federal Circuit? When did you begin your evaluation process?

Does your organization routinely learn of Federal Circuit nominations before they are formally made? If so, do you think this helps your organization to conduct a thorough and [illegible] evaluation of the candidate? If not, do you think that your group could make a more meaningful contribution to the nominations process if it received earlier notice of potential nominations?

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

June 1, 1987

Honorable Howard M. Metzenbaum
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Metzenbaum:

Attached are my responses to the questions you sent me under cover of your letter of May 22, 1987. If these responses require further elaboration or clarification, I shall be pleased to supplement them or to make myself available for discussion with you or your staff.

Sincerely,

Frederick L. Ikenson
Chairman, Judicial Selection Committee

Enclosures

FLI/kp

SCREENING MECHANISMS

Question: What mechanisms does your association use to evaluate nominees to the Federal Circuit? What is the composition of your screening committee? How are the members chosen? To whom do they report?

Answer: Our association relies on a screening committee to collect relevant information regarding judicial nominees and to report its findings to the Board of Directors.

Our screening committee, called the Judicial Selection Committee, currently consists of seven members of our bar association. They are:

Frederick L. Ikenson, Chairman
James S. O'Kelly, Deputy Chairman
David Busby
Joseph S. Kaplan
Robert V. McIntyre
Urban S. Mulvehill
Donald W. Paley

Each of the Committee members has had many years of experience in customs and international trade law.

The chairman of the Committee is elected by the members of the bar association. The other members of the Committee are appointed by the president of the bar association. In exercising his discretion in appointing members to this committee, the president consults with the chairman of the Committee and takes into account the interest and experience of persons willing to serve on the Committee.

Through its chairman, the Committee reports to the twelve person Board of Directors. The chairmen of each of the bar association's seven standing committees, which includes the Judicial Selection Committee, are elected to and serve on the Board. Also elected to and serving on the Board are the president, vice president, secretary, treasurer, and past immediate president of the bar association.

Question: What are the principal sources of information on which you rely in your evaluations of judicial nominees? For example, do you solicit the nominee's response to a questionnaire? Do you conduct interviews of the nominee? How do you identify persons who may have information about the nominee's fitness?

Answer: We rely principally on (a) the nominee's response to a questionnaire, (b) interviews of the nominee and of persons familiar with the character, works, and reputation of the nominee, and (c) our examination of materials published or written by the nominee. We solicit the nominee's response to a questionnaire which we devised specifically for nominees to the Court of Appeals for the Federal Circuit and the Court of International Trade. On at least one occasion when a nominee declined to answer our questionnaire, we were able to rely on the nominee's public response to the Senate Judiciary Committee's questionnaire.

We identify persons who may have information about the nominee's fitness primarily from the questionnaire response. The response will identify such persons or will lead to the identification of such persons. If the nominee is a judge or public official, persons possessing relevant information will include the nominee's colleagues, agency staff, and attorneys practicing before him or her.

NOTICE OF NOMINATION

Question: When and how did your association first learn of Judge Mayer's nomination to the Federal Circuit? When did you begin your evaluation process?

Answer: At some time during the summer of 1986, we learned of Judge Mayer's nomination from a member of the Federal Circuit Bar Association. Before communicating with Judge Mayer, we wished to have confirmation of his nomination. We promptly sought such confirmation from a cognizant Justice Department official but our request was politely refused. We were told that, prior to their transmittal to the Senate, the names of judicial appointments were and would be shared only with the Federal Bureau of Investigation and the American Bar Association.

In a subsequent conversation in late October, the Justice Department official advised us of his expectation that nominations to the Federal Circuit would be transmitted early in 1987. Although we still did not have confirmation of Judge Mayer's nomination, we decided to communicate with him in view of our concern that we would not have ample time to conduct our evaluation and present our report to the Senate Judiciary Committee. Thus, in late December, we wrote to Judge Mayer, requesting that he complete our questionnaire and that he meet with us.

Within days, Judge Mayer called to indicate his willingness to meet with us. However, he said that he would not feel comfortable answering our questionnaire since the Justice Department had discouraged him from responding to any bar association's questionnaire other than the American Bar Association's. We then determined that, without a questionnaire response, we would not be able to perform a satisfactory evaluation and we intended to so inform the Judiciary Committee. However, in April 1987, we gained access to the public version of Judge Mayer's response to the Judiciary Committee's questionnaire and we determined that we could go forward with the evaluation process, which we promptly did.

Question: Does your organization routinely learn of Federal Circuit nominations before they are formally made? If so, do you think this helps your organization to conduct a thorough and informative evaluation of the candidate? If not, do you think that your group could make a more meaningful contribution to the nominations process if it received earlier notice of potential nominations?

Answer: Our organization does not routinely learn of Federal Circuit nominations before they are formally made. Because of this, we are often deprived of any realistic opportunity to contribute to the nominations process. If we were to receive earlier notice of potential nominations and if we were to receive timely responses to our questionnaires, we are confident that we could make a more meaningful contribution to the process.

ROLE OF ABA

Question: The American Bar Association investigates every nominee to the Federal Circuit, as well as to other federal judicial posts. Why isn't the ABA investigation, and the resulting evaluation, sufficient to inform the Judiciary Committee of the bar's views on each nominee to the Federal Circuit?

Answer: Unlike the regional Courts of Appeals, the Federal Circuit is a national court with jurisdiction over special subject matters, including customs and international trade issues. The members of our bar association have substantial experience in the litigation of customs and trade disputes and are vitally concerned with the nominees to the Federal Circuit.

We are not satisfied that the ABA has the same degree of interest and we have no assurance that its final, terse judicial evaluation is sufficiently informed. In investigating nominees to the Federal Circuit the ABA does not consult with members of our Judicial Section Committee. Also, we are informed that its standing Committee on Federal Judiciary does not routinely consult with standing committees within the ABA whose members have particular knowledge and interest regarding the Federal Circuit.

We believe that we are able to supplement the ABA investigation with informed and more detailed evaluations of nominees' qualifications.

Question: Do you agree with the view that a nominee who is qualified for appointment to one of the eleven regional circuits is equally qualified for appointment to the Federal Circuit?

Answer: Yes. However, we also believe that experience in the substantive matters over which the Federal Circuit has jurisdiction, such as customs and international trade law, would be an asset to a nominee to the Federal Circuit. Indeed, we believe that Judge Mayer's qualifications have been enhanced by his years on the Claims Court -- not just because of the judicial experience but because of the experience he gained in subject areas of importance to the Federal Circuit. In a similar vein, the president of our bar association has recently written to the Justice Department to convey the bar's strong recommendation that judges of the Court of International Trade be given serious consideration for elevation to the Federal Circuit, as vacancies arise on that appellate court. Copies of that letter and the Justice Department's response are attached.

Question: It has been asserted that the information provided to the Senate as a result of ABA evaluations of judicial nominees is too brief to significantly help the Senate Judiciary Committee evaluate nominees. Do your organizations prepare more detailed evaluations, and do these evaluations include a discussion of the bases for the evaluations?

ROLE OF ABA - Page 2

Answer: We conduct confidential evaluations of nominees, taking into account primarily intellectual ability and performance, temperament and demeanor. Our written reports to date have essentially set forth our conclusions regarding a nominee's fitness for the bench. In the future, we will be glad to submit detailed evaluations which contain nonconfidential discussions of the bases for such evaluations; further, we will be pleased to meet with Judiciary Committee staff to discuss every nominee to the Federal Circuit and the Court of International Trade and, if it will be viewed as helpful, we will endeavor to provide testimony on every such nominee.

RELATIONS WITH JUSTICE DEPARTMENT

Question: Mr. Ikenson, you stated in your written testimony that the Justice Department "has consistently discouraged its nominees from providing [your association] with a response to our questionnaire." What is the evidence for this assertion?

Answer: Over the last several years, nominees to both the Federal Circuit and the Court of International Trade have so informed us. Also, a cognizant Justice Department official has acknowledged this.

Question: Do you know whether the Justice Department has discouraged nominees from cooperating with your investigative process in other ways? Do you know whether nominees have been advised not to cooperate at all with your efforts?

Answer: Over the last several years, judicial nominees have informed us that the Justice Department has discouraged nominees from meeting with us. We do not know whether nominees have been expressly advised "not to cooperate at all with . . . [our] efforts". However, since nominees have been discouraged from responding to our written questionnaires and have been discouraged from meeting with us, it would appear that they have effectively been advised "not to cooperate at all . . . ."

Question: Would it be too burdensome to ask a nominee to make himself available for ABA investigation as well as investigation by other bar associations that may have an interest in the nomination? What steps do you take to insure that your investigation is not burdensome to the nominee?

Answer: It would not be too burdensome to ask a nominee to the Federal Circuit or to the Court of International Trade to make himself available for ABA investigation as well as investigation by our association. We do not endeavor to duplicate the ABA's investigation and, in fact, we have taken pains to keep any overlap to a minimum. In our questionnaire, (a) we ask for copies of questionnaire responses and data provided to other bar associations, and (b) we ask a modest number of questions which are principally designed to elicit information regarding the nominee's experience or background in customs and international trade law matters. The questionnaire, a copy of which was submitted with our written testimony, is short and our interviews of nominees have consistently been cordial and not at all time-consuming.

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION
475 PARK AVENUE SOUTH
NEW YORK, N.Y. 10016
(212) 725-0200

DAVID O. ELLIOTT
PRESIDENT

April 3, 1987

The Honorable Stephen J. Markman
Assistant Attorney General
Office of Legal Policy
Department of Justice
Washington, D.C. 20530

Dear Mr. Markman:

Recently, the Chairman of our Judicial Selection Committee provided your Seth Liebman with a "judicial status" chart for the United States Court of Appeals for the Federal Circuit. Quite apart from the three current vacancies on that court, the chart reveals that three sitting judges are eligible for retirement now and three others will become eligible over the next three years. Under the circumstances, it appears quite likely that your office will be devoting continued attention to the nomination of candidates for that important court.

I am writing to you at this time to convey the strong recommendation of the Customs and International Trade Bar Association that your office give serious consideration to judges of the United States Court of International Trade (C.I.T.) in selecting candidates for the Federal Circuit. While the practice of "elevating" district judges to courts of appeals has not been uncommon among the various circuits, no judge of the C.I.T. (or of its predecessor, the Customs Court) in recent memory was appointed to the Federal Circuit (or to its predecessor on customs matters, the Court of Customs and Patent Appeals). It appears to us that the experience and knowledge gained by a C.I.T. judge stand to be positive qualities in a candidate for the appellate court and we would hope that you might share in that view.

Sincerely yours,

David O. Elliott
President, Customs and International
Trade Bar Association

PLEASE REPLY TO: 475 Park Avenue South, New York, New York 10016

U.S. Department of Justice

Office of Legal Policy

5/11/87

Assistant Attorney General

Washington, D.C. 20530

MAY 7 1987

David O. Elliott, Esquire
President, Customs and International
Trade Bar Association
475 Park Avenue South, 25th Floor
New York, New York 10016

Dear Mr. Elliott:

Thank you for your recent letter recommending that judges on the United States Court of International Trade (CIT) be given serious consideration for elevation to the United States Court of Appeals for the Federal Circuit as vacancies arise on this court.

We appreciate your concern with regard to several vacancies on the Federal Circuit that may arise in the near future. As positions do arise on this court, we will make every effort to assure that qualified candidates with experience in various areas of the law are considered. It is important for the Federal Circuit Court of Appeals to continue to fulfill its vital objective with knowledgeable, well-reasoned opinions. Sitting CIT judges do possess valuable knowledge and experience. However, we cannot guarantee that any particular vacancy will be filled with a CIT judge.

Again, we appreciate your taking the time to express your concerns.

Sincerely yours,

Stephen Markman

Stephen J. Markman
Assistant Attorney General

BIOGRAPHY

H. Robert Mayer

Date of Birth:	February 21, 1941	Buffalo, New York
Legal Residence:	Virginia	
Marital Status:	Married	Mary Anne McCurdy Mayer
Education:	1959 - 1963	United States Military Academy B.S. degree
	1968 - 1971	Marshall-Wythe School of Law J.D. degree
Bar:	1971	Virginia
	1980	District of Columbia
Military Service:	1963-1975	United States Army
Experience:	1971 - 1973	Law Clerk, Hon. John D. Butzner, Jr. U. S. Court of Appeals Fourth Circuit
	1973 - 1975	United States Army Judge Advocate General Corps Staff Judge Advocate
	1975 - 1977	McGuire, Woods & Battle Associate
	1977 - 1980	Special Assistant to Chief Justice Burger U. S. Supreme Court
	1980 - 1981	Baker & McKenzie Associate
	1981 - 1982	Deputy Special Counsel Merit Systems Protection Board
	12/1982-pres	Judge, United States Claims Court
Office:	717 Madison Place, N.W. Suite 712 Washington, D.C. 20005 202 633-0259	
Home:		

To be United States Circuit Judge for the Federal Circuit

QUESTIONNAIRE FOR JUDICIAL NOMINEES

HALDANE ROBERT MAYER

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**

Haldane Robert Mayer
H. Robert Mayer

2. **Address: List current place of residence and office address(es).**

Home:

Office:

United States Claims Court
717 Madison Place, N.W., Suite 712
Washington, D.C. 20005

3. **Date and place of birth.**

February 21, 1941
Buffalo, New York

4. **Marital status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).**

I am married to Mary Anne (McCurdy) Mayer, formerly of Huntsville, Alabama. She has been a mathematics teacher for the Fairfax County, Virginia, School System since 1983. From 1981 to 1983, she was a substitute teacher for Fairfax County.

Fairfax County Public Schools
Department of Personnel Services
6815 Edsall Road
Springfield, VA 22151

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

United States Military Academy
West Point, New York
July 2, 1959 - June 5, 1963
Bachelor of Science

Marshall-Wythe School of Law
The College of William and Mary
Williamsburg, Virginia
September 1968 - June 1971
Juris Doctor

The Judge Advocate General's School
University of Virginia
Charlottesville, Virginia
August 1972 - May 1973
Diploma

6. **List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor or employee since graduation from college.**

Dates	*Organization*	*Address*	*Position*
12/82-Present	U.S. Claims Court	717 Madison Pl. NW, Washington, D.C. 20005	Judge
08/82-10/82	Office of the Special Counsel, U.S. Merit Systems Protection Board	1120 Vermont Ave., NW, Washington, D.C. 20419	Acting Special Counsel (by designation of President Reagan)
06/81-12/82	Office of the Special Counsel, U.S. Merit Systems Protection Board	1120 Vermont Ave., NW, Washington, D.C. 20419	Deputy Special Counsel
10/80-06/81	Baker & McKenzie	815 Connecticut Ave., NW, Washington, D.C. 20006	Attorney
06/77-10/80	Supreme Court of the United States	First Street, NW, Washington, D.C. 20543	Special Assistant to the Chief Justice
10/75-06/77	McGuire, Woods & Battle	Court Square Bldg, Charlottesville, VA 22901	Attorney
10/75-06/77	University of Virginia Law School	Charlottesville, VA	Instructor (part-time)
06/63-10/75	United States Army		Officer
07/71-08/72	U.S. Court of Appeals for the Fourth Circuit	10th & Main Sts., Richmond, VA	Law Clerk to Judge John D. Butzner, Jr.

(I was on active duty with the United States Army while serving as Judge Butzner's law clerk.)

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes.
June 5, 1963 - October 15, 1975
United States Army, Serial Number 126-32-1713

Early in my military career, I served as an officer in the Infantry. I completed a rigorous training program which included Ranger, military parachutist, air and ground operations, jumpmaster, counter-insurgency and foreign language training. After an initial assignment as a commander and staff officer with the 101st Airborne Division, I served a tour in Vietnam as a Ranger Battalion advisor in combat operations. My later assignments consisted of commanding a company of approximately 400 personnel at two locations, and service as an electronics engineer in the Army's research and development program. The latter assignment involved testing and evaluating experimental equipment, contract administration, and contract disputes resolution. I then attended law school on an unpaid leave of absence from the Army and at no expense to the Army. I returned to active service after law school as an officer in the Judge Advocate General's Corps and my career in that capacity is fully described in answer to questions 17, 18 and 19, below. I submitted a voluntary resignation and was honorably discharged in 1975 with the rank of Major, Army of the United States. In May of 1985, I retired from the United States Army Reserve as a Lieutenant Colonel.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Graduated first in class - William and Mary Law School, 1971
Editor-in-Chief, *William and Mary Law Review*, 1970-71
William A.R. Goodwin Scholarship, 1969-71
West Publishing Company Scholarship Award, 1969, 1970

American Jurisprudence Awards:
    Corporation Law
    Torts
    Creditor's Rights and Debtor's Remedies
Award, Outstanding Law Review Candidate, 1969
Omicron Delta Kappa National Leadership Society
St. George Tucker Society (Marshall-Wythe School of Law)

* * *

Bronze Star Medal
Meritorious Service Medal
Two Army Commendation Medals
Combat Infantry Badge
Campaign and Service Ribbons
Ranger Tab
Parachutist Badge
Ranger Combat Badge

9. **Bar Associations: List all bar associations, legal or judicial related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

American Bar Association 1155 East 60th Street Chicago, Illinois Public Contracts Section Taxation Section Patent, Trademark & Copyright Section	Member 1971 - Present
Virginia State Bar Imperial Building 5th & Franklin Streets Richmond, Virginia 23219	Member 1971 - Present
District of Columbia Bar 1426 H Street, N.W. Washington, D.C. 20005	Member 1980 - Present
Charlottesville-Albemarle Bar Association 420 Park Street Charlottesville, Virginia 22901	Member 1975 - 1977

I have participated in three Judicial Conferences of the Federal Circuit and two of the District of Columbia Circuit, and am a member of the Rules Committee of the United States Claims Court.

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational, "public interest" law, etc.), which you feel should be considered in connection with your nomination.**

To the best of my knowledge, no organization to which I belong is active in lobbying before public bodies.

West Point Society of D.C. Box 29 The Army & Navy Club 1627 Eye Street, N.W. Washington, D.C. 20006	Member 1982 - Present

Army Athletic Association United States Military Academy West Point, New York 10996	Member 1963 - Present
United States Military Academy Association of Graduates West Point, New York 10996	Member 1963 - Present
Supreme Court Historical Society 1511 K Street, N.W. Washington, D.C.	Member 1980 - Present
William and Mary Law School Association Marshall-Wythe School of Law Williamsburg, Virginia 23185	Member 1971 - Present Director, 1979-85
National Lawyers Club 1815 H Street, N.W. Washington, D. C. 20006	Honorary Member 1982 - Present

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Court	*Date of Admission*
Supreme Court of the United States	April 4, 1977
Supreme Court of Virginia	October 5, 1971
United States Court of Appeals for the Fourth Circuit	June 7, 1972
United States District Court for the Eastern District of Virginia	March 30, 1972
United States Court of Military Appeals	October 6, 1973
United States Army Court of Military Review	October 25, 1973
District of Columbia Court of Appeals	October 1, 1980
United States Claims Court	March 26, 1984

12. Published Writings: List the titles, publishers and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Note, *Preventive Detention and the Proposed Amendment to the Bail Reform Act of 1966*, 11 Wm. & Mary L. Rev. 525; Comments, 11 Wm. & Mary L. Rev. 261; 10 Wm. & Mary L. Rev. 767 and 997 (1969).

13. Health: What is the present state of your health? List the date of your last physical examination.

Health: Good
Last physical examination: November 20, 1985.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I am serving as a judge on the United States Claims Court and was appointed by the President on December 10, 1982, for a term of fifteen years. The court is the successor to the Court of Claims and has nationwide jurisdiction over suits against the United States based on the Constitution, contracts, statutes, and regulations. *See* 28 U.S.C. § 1491. The court has limited equitable authority in the field of government contracts. Approximately a third of the cases request tax refunds, an area in which federal district courts have concurrent jurisdiction. Another third of the cases is based on contract, primarily under the Contract Disputes Act of 1978. Other major areas of the court's jurisdiction include patent and copyright, inverse condemnation under the Fifth Amendment of the Constitution, civilian and military pay, Congressional References, and Indian claims.

15. **Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.**

(1) ° *Welsh v. United States*, 2 Cl. Ct. 417 (1983).

° *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55 (1983).

° *Sullivan v. United States*, 4 Cl. Ct. 70 (1983), *aff'd*, 742 F.2d 628 (Fed. Cir. 1984).

° *Eagle Construction Corp. v. United States*, 4 Cl. Ct. 470 (1984).

° *Mack Trucks, Inc. v. United States*, 6 Cl. Ct. 68 (1984), *appeal dismissed*, No. 85-903 (Fed. Cir. April 16, 1985).

° *Acker v. United States*, 6 Cl. Ct. 503 (1984).

° *Carlton v. United States*, 7 Cl. Ct. 323 (1985), *aff'd*, 782 F.2d 173 (Fed. Cir. 1986).

° *Principle Business Enterprises, Inc. v. United States*, 7 Cl. Ct. 433 (1985).

° *Althaus v. United States*, 7 Cl. Ct. 688 (1985).

° *Gibraltar Financial Corp. v. United States*, 10 Cl. Ct. 31 (1986).

(2) ° *Vargas v. United States*, 2 Cl. Ct. 727 (1983), *aff'd in part, rev'd in part*, Nos. 83-1370, 1384 (Fed. Cir. March 26, 1984) (unpublished). Reversed in part because a disputed material fact made entry of judgment for plaintiff on defendant's motion inappropriate.

° *L'Enfant Plaza Properties, Inc. v. United States*, 3 Cl. Ct. 582 (1983), *aff'd and remanded*, No. 84-665 (Fed. Cir. Aug 10, 1984) (unpublished). Affirmed and remanded because award of expenses to plaintiff, in addition to the damages allowed, was assertedly overlooked.

° *Cavalier Clothes, Inc. v. United States*, No. 128-86C, *rev'd and remanded*, No. 86-1053 (Fed. Cir. Jan. 20, 1987). Reversed on question of jurisdiction.

(3) ° *Hendler v. United States*, 11 Cl. Ct. 91 (1986); *Althaus v. United States*, 7 Cl. Ct. 688 (1985). Fifth Amendment taking of property without just compensation issues.

° *Seagate v. United States*, 4 Cl. Ct. 25 (1983), *aff'd*, No. 2-76 (Cl. Ct. Aug. 20, 1984) (unpublished). Fifth Amendment equal protection issues.

- *Church of the Visible Intelligence v. United States*, 4 Cl. Ct. 55 (1983). First Amendment religion issues in tax law.

16. **State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Dates	*Organization*	*Address*	*Position*
07/71-08/72	U.S. Court of Appeals for the Fourth Circuit	10th & Main Sts., Richmond, VA	Law Clerk to Judge John D. Butzner, Jr.
06/77-10/80	Supreme Court of the United States	First Street, NW, Washington, D.C. 20543	Special Assistant to the Chief Justice
06/81-12/82	Office of the Special Counsel, U.S. Merit Systems Protection Board	1120 Vermont Ave., NW, Washington, D.C. 20419	Deputy Special Counsel
08/82-10/82	Office of the Special Counsel, U.S. Merit Systems Protection Board	1120 Vermont Ave., NW, Washington, D.C. 20419	Acting Special Counsel (by designation of President Reagan)

All of these positions were appointed. I have not been a candidate for elective public office.

17. **Legal Career:**

a) **Describe chronologically your law practice and experience after graduation from law school including:**

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1971-73 Upon graduation from law school in 1971, I served as law clerk to the Honorable John D. Butzner, Jr., Circuit Judge of the United States Court of Appeals for the Fourth Circuit. I served in that capacity while still on active duty with the United States Army.

Honorable John D. Butzner, Jr.
U.S. Court of Appeals for the Fourth Circuit
10th and Main Streets
Richmond, VA 23217

Upon completion of the clerkship in August of 1972, I attended the Graduate Course at the Judge Advocate General's School at the University of Virginia. This is a year-long Master's level course of instruction covering many areas of law of interest to military and government lawyers, including constitutional law, criminal law, federal and military procedure, federal contracts and procurement, federal personnel and labor law, taxation, domestic relations, international law and various managerial and military subjects. At the conclusion of this course of study, I resumed my military career as a lawyer in the Judge Advocate General's Corps.

1973-75 I served variously between 1973 and 1975 as Chief Trial Defense Counsel (General and Special courts-martial), and Chief of Criminal Justice Administration. I also was the Acting Staff Judge Advocate and Deputy Staff Judge Advocate for a major United States Army installation, the United States Army Armor Center, Ft. Knox, Kentucky. In this capacity, I was the principal legal counsel for the commanding general and subordinate command and staff officers. Simultaneously, I was counsel for officials administering the dependent school system, the civilian personnel program, the general hospital and other activities at the installation. My staff consisted of 30 lawyers and 40 to 45 military and civilian support personnel, and served a community of more than 40,000 persons.

In addition to administering the criminal justice program, my duties required legal review of procurement and contracting activities, coordination and cooperation with United States Attorneys and Department of Justice staff, administration of cases brought before the United States Magistrate, legal advice and counsel during civil disturbances and natural disasters, administration and adjudication of claims against the United States under the Federal Tort Claims Act, review of legal aspects arising in the course of the administration of a general hospital, administration of the program to provide legal assistance to military and qualified civilian persons in the areas of domestic relations, debtor and creditor rights, landlord/tenant, tax and similar matters. Further duties included a continuing course of instruction on the law of war and legal supervision and instruction of the Military Police and Criminal Investigation Division. Liaison and cooperation with Federal Bureau of Investigation agents were also required. At the conclusion of this assignment, I voluntarily resigned my commission in the Regular Army and accepted a commission in the United States Army Reserve.

Major General Hugh R. Overholt
The Judge Advocate General
Department of the Army
Room 2E444
Washington, D. C. 20310

1975-77 In 1975, I joined the now 300 lawyer Virginia law firm of McGuire, Woods & Battle and began the private practice of law at its Charlottesville, Virginia, office. My practice was almost exclusively general civil litigation, involving frequent court appearances. The cases were wide-ranging and included representation primarily of defendants in civil rights, medical malpractice, wrongful death, personal injury and property damage, labor relations, breach of contract, real estate (specific performance), pension and profit sharing, libel and slander, and other matters. During this period, I also was a part-time instructor of trial advocacy at the University of Virginia School of Law.

Jay T. Swett
McGuire, Woods, Battle & Booth
Court Square Building
5th and E. Jefferson Streets
Charlottesville, VA 22901

Robert Patterson
McGuire, Woods, Battle & Booth
One James Center
Richmond, VA 23219

1977-80 In 1977, I was selected by the Chief Justice of the United States, Warren E. Burger, to be his Special Assistant. As the senior lawyer on the staff of the Chief Justice, my duties required me to work in close cooperation with the law clerks to the Chief Justice and to other Justices, as well as with the other Justices and officers of the Court and officials at the Administrative Office of the United States Courts and the Federal Judicial Center. My service to the Chief Justice included participation in the review of petitions for certiorari, research and drafting of memoranda and opinions, providing views on cases during the evolution of the decision making process, and coordinating the activities of members of his staff in the interest of efficiency and timeliness. My professional relationship with the Chief Justice, and with other Justices, was of a confidential nature, involving primarily judicial and legal matters. However, there were certain supervisory and managerial responsibilities attendant upon the office. Among these, for example, was responsibility for the preparation of reports on the petitions for certiorari filed with the Court, which was accomplished by the law clerks for five of the Justices "pooled" for this limited purpose under my supervision. I also oversaw the activities of the Conference Coordinator, who was responsible for preparations for the regular conferences of the Justices. I participated in some matters involving the Congress and executive agencies. For example, among the tasks I performed was service as the personal representative of the Chief Justice in the establishment of the United States Foreign Intelligence Surveillance Courts.

Chief Justice Warren E. Burger
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

1980-81 After approximately three and one-half years at the Court, I joined the international law firm of Baker & McKenzie at its Washington, D.C., office in the fall of 1980. My practice with this firm consisted of corporate work, and litigation.

Michael Waris, Jr.
Baker & McKenzie
815 Connecticut Avenue, N. W.
Washington, D. C. 20005

1981-82 In June of 1981, I was appointed Deputy Special Counsel of the Merit Systems Protection Board. For the 18 months I was with that office (two months as Acting Special Counsel by designation of President Reagan), I participated as one of two non-career officials in this quasiindependent agency in the administration and management of the programs, personnel and other activities of the office. I supervised investigative and prosecutorial matters within the jurisdiction of the Office of the Special Counsel as required by title 5 of the United States Code. My other duties included congressional relations, administration of the budget of the agency, supervision of the field offices, supervision of personnel and procurement activities, and other areas commonly encountered in the operation of a federal agency.

Office of the Special Counsel
United States Merit Systems
Protection Board
1120 Vermont Avenue, N. W.
Washington, D. C. 20419

Honorable Alex Kozinski
United States Circuit
Judge
125 S. Grand Avenue
Suite 200
Pasadena, CA 91105
(formerly Special Counsel)

b.

(1) What was the general character of your law practice, dividing it into periods with dates if its character changed over the years.

The general character of my practice has been described in the answer to Question 17(a), above. With specific reference to my trial and litigation experience, my practice might conveniently be divided between the period when I was primarily involved in criminal law and the period when my primary emphasis was on civil matters. From 1968 through 1974, while in the United States Army, I participated in many courts-martial, both Special and General, involving the prosecution and defense of the full range of common law felonies, as well as offenses unique to the military. This included robberies, burglaries, assaults, drug offenses, sex crimes, and the like, and military crimes such as desertion. I would estimate the number of trials, both jury and non-jury, at more than 150.

While with McGuire, Woods & Battle and later with Baker & McKenzie, my trial and litigation practice was almost exclusively of a general civil nature. The substantive nature of the matters handled has been described in answer to Question 17(a), above, and some examples are given in response to Question 18, below.

2) **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

My typical clients while serving as defense counsel in military service were soldiers from the enlisted ranks, and included a few non-commissioned and commissioned officers. In my capacity of Deputy and Acting Staff Judge Advocate, my clients were commanders, doctors, administrators and police. In private practice, I represented individuals, as well as corporations (such as a telephone company, insurance companies, an electric and power company, an automobile manufacturer), a school board and hospitals. My area of specialization was litigation.

c.

1. **Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court has varied, describe each such variance, giving dates.**

While I was an Army lawyer, I appeared in court regularly and between the years 1968 and 1974 participated in more than 150 criminal trials, both jury and non-jury. Part of this time, as can be seen, was before my admission to the bar. During that period I was permitted to prosecute minor offenses before special courts-martial. In 1974 and 1975, I had responsibility as the Chief of Criminal Justice Administration, Deputy and Acting Staff Judge Advocate, for all criminal prosecution and defense functions at Fort Knox, Kentucky, a major installation. Since passage of the Uniform Code of Military Justice in 1969, military courts are essentially equivalent to civilian criminal courts, with similar procedures, protections and rules.

During my years with McGuire, Woods and Battle, in Charlottesville, Virginia, 1975-77, I appeared regularly in court, primarily state courts, and in federal district court. From 1977 to 1980, as Special Assistant to the Chief Justice, I was prohibited from practicing law. In 1980-81, with Baker and McKenzie, Washington, D. C., I participated in one court appearance in a Maryland state court to argue a motion for summary judgment. The rest of my practice included corporate and securities matters. As Deputy and Acting Special Counsel of the Merit Systems Protection Board, I supervised staff lawyers in litigation before administrative law judges.

2. **What percentage of these appearances was in**

a) Federal courts - 5% (est.)
b) Military courts of record - 45% (est.)
c) State courts of record - 20% (est.)
d) Other courts - 30% (est.)

3. **What percentage of your litigation was**

a) Civil - 50% (est.)
b) Criminal - 50% (est.)

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

Primarily as sole counsel, but occasionally as associate counsel, I estimate that I tried approximately 100 cases to verdict or judgment in courts of record.

5. What percentage of these trials was

a) Jury - 20% (est.)
b) Non-jury - 80% (est.)

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case a) the date of representation; b) the name of the court and the name of the judge before whom the case was litigated; and c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I have retained few papers from military practice and private practice with McGuire, Woods and Battle in Charlottesville, Virginia, and cannot recall many specific cases handled ten to fifteen years ago. Because of the records destruction policy of the firm, records of my work there are no longer available. However, I have listed capsule summaries of some cases and have provided the names of the judges before whom I regularly appeared and counsel against whom I had cases, and who know of my performance as a lawyer and professional qualifications.

° In the period 1975 to 1977, I represented a defendant who was sued for libel and slander. The alleged offense arose in the course of depositions of third parties and the defense presented was that the communications were privileged because they arose in the course of judicial proceedings. We prevailed in the trial court and the judgment was affirmed by the Supreme Court of Virginia. 248 S.E. 2d 826 (1978). I did not participate at the Supreme Court of Virginia because I had left the firm for my position as Special Assistant to the Chief Justice.

° In the period 1975 to 1977, I represented a chain of regional department stores in the defense of its pension plan. The plan was challenged by a former employee who did not appear to meet the requirements for participation. The client would have been required to significantly alter or drop the plan if the challenge had been successful. After presentation of evidence, the plaintiff took a nonsuit in the case.

° In the period 1975 to 1977, I represented an insurance company which had inaugurated an experimental policy for fire departments and rescue squads. Essentially, this insurance policy would pay the replacement value for emergency vehicles deemed a total loss, rather than depreciated value which was the common industry practice. The importance of this case to the client was that defeat would have made these policies economically impractical and they would have had to be terminated in the states where they had been inaugurated. After a jury trial, judgment was entered in favor of my client.

° During the period 1975 through 1977, I participated as co-counsel for plaintiff in a suit for the specific performance of a contract for the sale of land in Albemarle County, Virginia. After a full trial in a court of equity, a decree was entered in favor of our client.

° During the period 1975 through 1977, I represented four or five defendants as counsel or co-counsel in personal injury cases. In most of these cases plaintiffs established liability but damages were successfully mitigated.

- In the period 1975 to 1977, I represented a major automobile manufacturer in a case in which it was alleged that the vehicle would suddenly shift from neutral to reverse. On one such occasion, plaintiffs were injured by the vehicle. After extensive discovery, the case was settled.

- In the period 1980 to 1981, I represented an individual and his corporation as plaintiffs in a series of cases in the state courts of Maryland. In one case for specific performance of a contract for the sale of an expensive tract of land, after extensive discovery and hearings, judgment was entered in favor of defendants on cross-motions for summary judgment. Thereafter, the other cases, one in the nature of defamation against a bank and its officers, the other for reformation of financial documents, were settled.

- During the period 1968 through 1974, I prosecuted or defended many felony cases before the military courts. These cases involved such crimes as robbery, assault and battery, possession and sale of drugs, and forgery. Many of these cases were before a jury. This phase of my career is more fully described in answers to Questions 9 and 10, above.

Judges before whom I appeared regularly:

Honorable David Berry
16th Judicial Circuit
P.O. Box 324
Madison, VA 22727
Office: 804-985-3766
Home: 703-948-4295

Honorable Herbert A. Pickford
16th Judicial Circuit
315 E. High Street
Charlottesville, VA 22901
Office: 804-293-5859

Honorable D. B. Marshall
Retired Judge
Charlottesville General District Court
1870 Way Side
Charlottesville, VA 22903
Home: 804-296-7756

Opposing counsel while I was in private practice include:

Edgar F. Puryear, Jr.
P.O. Box 346
Madison, VA 22727
Office: 703-948-4300
Home: 703-948-4382
(Mr. Puryear was also a judge in cases in which I participated, and was a member of a school board which I represented in litigation.)

Brian J. Donato
Michie, Hamlett, Donato & Lowry
500 Court Square, Suite 300
Charlottesville, VA 22901
Office: 804-977-3390

Bruce D. Rasmussen
Michie, Hamlett, Donato & Lowry
500 Court Square, Suite 300
Charlottesville, VA 22901
Office: 804-977-3390

James B. Murray, Jr.
P.O. Box 1465
Charlottesville, VA 22902
Office: 804-971-8080

W. Gale Pickford
Pickford & Barkley
230 Court Square
Charlottesville, VA 22901
Office: 804-296-8191

Edward B. Lowry
Michie, Hamlett, Donato & Lowry
500 Court Square, Suite 300
Charlottesville, VA 22901
Office: 804-977-3390

Fred G. Wood, Jr.
Wood & Stone
100 Court Square Annex
P.O. Box 97
Charlottesville, VA 22902
Office: 804-977-3143

B. Waugh Crigler
United States Magistrate
255 West Main Street
Room 328
Charlottesville, VA 22901
Office: 804-296-7779

J. Robert Snoddy III
P.O. Box 325
Dillwyn, VA 23936
Office: 804-983-2408

F. Guthrie Gordon III
Gordon & Wyatt
416 Park Street
Charlottesville, VA
Office: 804-296-4130

Ronald R. Tweel
Michie, Hamlett, Donato & Lowry
500 Court Square, Suite 300
Charlottesville, VA 22901
Office: 804-977-3390

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Aside from my present judgeship, I consider my clerkship with Judge John D. Butzner, Jr., of the United States Court of Appeals for the Fourth Circuit in 1971 and 1972, and my service as Special Assistant to the Chief Justice of the United States, Warren E. Burger, from 1977 to 1980, of special significance. Through them I became intimately familiar with the appellate judicial process. From them I learned of the dedication, thoughtfulness, sensitivity, scholarship and stamina that is required of the successful judge. In my present capacity, I have endeavored to follow their example and to evenhandedly and objectively resolve the disputes presented for resolution.

As a practicing lawyer, I was fortunate both in the military and in private practice to have significant, independent responsibility for a wide range of activities that have proven to be a sound foundation for my role as a judge. Not only was I at once responsible for representing accused servicemen at military trials, but I was given the opportunity to supervise, guide and counsel thirty lawyers who were the legal representatives for all criminal justice and civil matters at one of the largest military installations in the country. Those matters are discussed elsewhere in these papers, but the variety and demands of the issues were an intensive education which has been of enormous benefit in my career.

In private practice, I was responsible for a sizeable caseload of a wide variety of cases, discussed above, in the litigation process. This gave me the opportunity for frequent appearances in civil courts similar to my earlier intensive trial experience in the criminal context. From this grew an appreciation for the strengths and limits of the litigation process and the demands and stresses placed on the participants.

As examples of significant legal matters, I would cite the following. I was the legal advisor to medical doctors in an instance when establishment of the legal death of an individual was required before approval of an urgent organ transplant could be given. I advised a military commander on the extent of his permissible assistance to civil authorities during a serious civil disturbance in a major city. My staff advised military authorities about the extent of legally permissible assistance to a town devastated by tornados. Co-counsel and I represented a county school board in a student's civil rights suit, after which I drafted constitutionally sound disciplinary procedures for use in that school system. I conducted a liability investigation for a psychiatric hospital after a patient left without permission and was killed. During my years at the Supreme Court and earlier as a law clerk at the Fourth Circuit Court of Appeals, many of the significant issues of the day were presented for judicial resolution and I found participation in the process an intensely educational experience. These examples illustrate the varied activities I pursued over the years which now form a foundation for my understanding of the human condition and societal pressures. From this foundation, I would expect to be readily able to issue informed judgments in disputes before the court in conformity with the overriding concept of equal justice under the law for all.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I anticipate no conflicts of interest. However, depending on the perceived seriousness of any potential conflict of interest, I will either recuse myself from any case where such conflict appears, or, if the conflict is more apparent than real, I will make full disclosure on the record to the parties and either secure their agreement to proceed or entertain any motion for recusal that may be presented.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No.

5. **If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?**

Not applicable.

6. **Please complete the attached financial net worth statement in detail. (Add schedules as called for.)**

See attached Net Worth Statement.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	7	752	65
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	160	000	00
Real estate mortgages receivable			
Autos and other personal property	75	000	00
Cash value—life insurance			
Other assets—itemize:			
Total assets	242	752	65

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured	6	098	82[1]
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	115	852	31[2]
Chattel mortgages and other liens payable	15	583	30[3]
Other debts—itemize:	3	200	00[4]
USAA Fed. Sav. Mastercard			
Bank of VA Mastercard			
United VA VISA			
Total liabilities	140	734	43
Net worth	102	018	22
Total liabilities and net worth	242	752	65

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

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[1] Home improvement loan; Sovran Bank, Springfield, Virginia.

[2] Mortgage on residence; Weaver Brothers, Inc., Washington, D. C.

[3] Automobile loan; NS&T Bank, Washington, D. C.

[4] Consumer purchases.

III. GENERAL (PUBLIC)

1. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

There can be little debate that at times in recent years the federal judiciary has exceeded its proper role to resolve cases and controversies and thereby affected the balance among the three branches of government. Similarly, it has intruded upon the affairs of state and local governments (and non-governmental institutions), threatening the precarious arrangements that define our federal republic. This problem has developed because of a willingness to reach beyond immediate, concrete grievances properly before the courts to grapple with perceived or even real problems clearly the province of another branch or level of government or of other institutions. Even if the results are wise or desirable the courts should not displace the responsibility of other governmental entities. If they do, remedies may be too broad, poorly received and ineffectually implemented. By this conduct, the courts become enmeshed in the political process from which they are wisely intended to be excluded. Resulting erosion of respect for the judiciary affects its overall effectiveness for it must inevitably rely on others for compliance with its judgments.

Careless or intentional abandonment of threshold jurisdictional or jurisprudential requirements such as justiciability, standing, ripeness or proper composition of a class, has encouraged litigants to eschew the appropriate forums for addressing their concerns. Strict adherence to these requirements would force these issues before appropriate institutions where more deliberation, accommodation and patience are likely to produce more reasonable, palatable and effective solutions. This would better accommodate the complicated plan under which this nation exists, based on the separation of powers doctrine, on the one hand, and federalism, on the other.

The judiciary has not acted alone. It would be prudent for legislators to take great care in the drafting of laws and thereby lessen the opportunity for judicial incursion on their prerogatives. But even the most carefully crafted statute, so often the result of accommodations, balancing of interests and institutional pressures, cannot anticipate all questions which might arise in its execution. The judiciary must interpret and apply the law when these questions are presented to it. In those cases, it should answer the questions presented strictly in accordance with congressional intentions. Selection of judges with an understanding and appreciation of their proper role and the enactment of laws that do not invite "judicial legislation" should curb judicial activism as contemplated by this question.

2. **What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged?**

I am dedicated to the principle of equal justice under the law for all. I have chosen the law as my profession and have diligently applied myself in many different capacities within that profession. I have defended persons charged with criminal offenses, served Judge John D. Butzner, Jr., a respected member of the federal judiciary, as a law clerk, and served for nearly three and a half years as the principal legal assistant to the Chief Justice of the United States concerned primarily with the judicial responsibilities of his office. As a judge I view the principle of equal justice under the law as a sacred obligation of office.

I have participated in educational activities for law students and lawyers such as moot courts and trial advocacy programs. For my part-time teaching at the University of Virginia Law School, modest payment was made to the law firm which in turn made the money available for use in conducting the course, for example to pay expenses for sitting judges to come to Charlottesville and participate in the program. I have participated in Law Day activities, met with student groups, and visited school to speak about law and justice and its overriding value to our democracy.

When I was in private practice in Charlottesville, Virginia, I volunteered for and was given court appointments to represent indigent defendants in criminal cases. While in government service my ability to perform non-government legal services was limited by law, although I spent considerable time counseling my military clients beyond merely representing them in criminal proceedings in the hope of enhancing the likelihood of long term rehabilitation.

AFFIDAVIT

I, Haldane Robert Mayer, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

January 12, 1987
(DATE)

Haldane R. Mayer
(NAME)

Juanita C. Dooley
(NOTARY)

My Commission expires February 14, 1988.

Rcvd 2/6/87
RJ.

ABA

AMERICAN BAR ASSOCIATION **Standing Committee on Federal Judiciary**
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101

Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Bierbower
International Square
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1875 Eye Street, N.W.
Washington, DC 20006

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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: H. ROBERT MAYER
United States Court of Appeals
for the Federal Circuit

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of H. Robert Mayer for appointment as Judge of the United States Court of Appeals for the Federal Circuit.

Our Committee is unanimously of the opinion that Judge Mayer is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

LAYN R. PHILLIPS

Birth:	January 2, 1952	Oklahoma City, Oklahoma
Legal Residence:	Oklahoma	
Marital Status:	Married	Kathryn H. Hastings 1 step-child
Education:	1970 - 1974	University of Tulsa B.S.B.A. degree
	1974 - 1977	University of Tulsa College of Law J.D. degree
	1978 - 1979	Georgetown University Law School LL.M. degree
Bar:	1977	Oklahoma
	1979	District of Columbia
	1982	California
Experience:	1977	Public Defender's Office Intern
	1977 - 1980	Federal Trade Commission Bureau of Competition Attorney
	1980 - 1983	U. S. Department of Justice Assistant U. S. Attorney Central District of California
	11/80 - 2/81	Assistant U. S. Attorney Southern District of Florida
	1983 - 1984	United States Attorney (by Court Appointment) Northern District of Oklahoma
	1984 - present	United States Attorney (Presidentially Appointed) Northern District of Oklahoma
Office:	3600 United States Courthouse 333 West Fourth Street Tulsa, Oklahoma 74103 918 581-7463	
Home:		

To Be United States District Judge for the Western District of Oklahoma

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC).

1. Full name (include any former names used).

Layn Raymond Phillips

2. Address: List current place of residence and office address(es).

Residence: 2709 S. 109 E. Avenue
Tulsa, Oklahoma 74129
(918) 663-1893

Office: United States Attorney's Office
3600 United States Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

3. Date and place of birth.

January 2, 1952
Oklahoma City, Oklahoma

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Kathryn H. Phillips, Attorney

Andrews, Davis, Legg, Bixler,
Milsten, & Murrah
500 West Main
Oklahoma City, Oklahoma 73102

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Tulsa (1970-74)
Tulsa, Oklahoma
Degree: B.S.B.A. - Economics (With Honors)

University of Tulsa College of Law (1974-77)
Tulsa, Oklahoma
Degree: Juris Doctor (With Honors)

Georgetown University Law School (1978-79)
Washington, D.C.
Curriculum: LL.M.
Transferred to U.S. Attorney's Office in Los Angeles prior to completion of degree requirements.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

a. Executive Director (1975-76)
Commission on the Review of the National
Policy Toward Gambling
[Intern Assistant to Executive Director]
Washington, D.C.

James E. Ritchie, Esq.
Suite 400
499 South Capitol Street, S.W.
Washington, D.C. 20003
(202) 484-2100

b. Public Defender's Office (1976-77)
[Intern Assistant]
Tulsa County Courthouse
Fifth and Denver
Tulsa, Oklahoma 74103
(918) 584-0471, Ext. 2660

Pete Silva, Chief Public Defender

Leslie Earl, Esq.
(Former Chief Public Defender)
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124

c. Bureau of Competition (1977-80)
Federal Trade Commission
[Trial Attorney]
Room 272 6th & Pennsylvania Ave., N.W.
Washington, D.C. 20580

James H. Sneed, Esq.
Ronald A. Bloch, Esq.
(Former Assistant Directors,
Bureau of Competition)
McDermott, Will and Emery
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000

K Keith Thurman, Esq.
(Former Senior Trial Counsel,
Bureau of Competition)
Thurman and Thurman
Beach Tower - Suite 200
3330 Pacific Avenue
Virginia Beach, Virginia 23451
(804) 422-0060

d. United States Attorney's Office (1980-1983)
[Assistant United States Attorney]
312 North Spring Street
Los Angeles, California 90012
(213) 894-2434

Stephen S. Trott
Associate Attorney General
(Former United States Attorney, Los Angeles)
Department of Justice
Room 4119
10th and Constitution Ave., N.W.
Washington, D.C. 20530
(202) 633-3752

Robert L. Brosio
Chief, Criminal Division
United States Attorney's Office
312 North Spring Street
Los Angeles, California 90012
(213) 894-2434

e. United States Attorney's Office (Nov. 1980-Feb. 1981)
[Special Assistant United States Attorney]
155 South Miami Avenue
Miami, Florida 33130
(305) 350-4471

Martin R. Raskin, Esq.
(Former Chief, Criminal Division)
Raskin and Graham
744 Northwest 12th Avenue
Suite 200
Miami, Florida 33136
(305) 324-4200

f. United States Attorney's Office (1984-Present)
[United States Attorney]
3600 U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

Stephen S. Trott
Associate Attorney General
Department of Justice
Room 4119
10th and Constitution Ave., N.W.
Washington, D.C. 20530
(202) 633-3752

William P. Tyson
Director, Executive Office
for United States Attorneys
10th and Pennsylvania Avenue, N.W.
Room 1619
Washington, D.C. 20530
(202) 633-2121

g. University of Tulsa College of Law (1984 to Present)
[Adjunct Professor]
3120 East Fourth Place
Tulsa, Oklahoma 74104
(918) 592-6000

Dean Frank K. Walwer
Associate Dean John F. Hicks

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

ACADEMIC HONORS

Law School (1974-77)

Class Rank: 2 out of 128
3.5 Cumulative Grade Point Average: Named to Dean's Honor Roll each Semester
American Jurisprudence Award Winner: Federal Courts
American Jurisprudence Award Winner: Real Property Law
Managing Editor - Tulsa Law Journal Volume 12
Recipient of the Oklahoma Bar Association Scholarship
Recipient of the 1977 Robert C. Butler, Jr. Award for Excellence in Legal Scholarship and Writing

Undergraduate (1970-74)

3.8 Cumulative Grade Point Average - Named to President's and Dean's Honor Roll Eight Consecutive Semesters
1972 Rhodes Scholar Candidate from University of Tulsa to State Selection Committee
1974 Wall Street Journal's Award Winner for Outstanding Economics Graduate -- Class Rank: 2 out of 204 Colleg of Business Graduates

ATHLETIC ACHIEVEMENTS

1974 NCAA Missouri Valley Tennis Champion - Number 1 Singles
Named to Outstanding College Athletes of America 1974
University of Tulsa Varsity Tennis Team - 4-year Letterma
University record for most singles victories during 4-yea career and single season
Finalist for 1974 Jack Charvat Award: Given to Oklahoma's Collegiate Athlete of the Year

SCHOLARSHIPS AWARDED

1970-71 H.O. McClure Scholarship Winner
1970-74 University of Tulsa NCAA Tennis Grant
1975-76 NCAA Post Graduate Scholarship
1976-77 Oklahoma Bar Association Scholarship

OTHER AWARDS

Oklahoma Jayees' 1987 Outstanding Young Oklahoman Award

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Oklahoma Bar Association (1977-Present)
District of Columbia Bar Association (1978-Present)
California Bar Association (1981-Present)
U.S. Attorney Representative to the Tenth Circuit Advisory Committee (1985-86)
Member/Attorney General's Advisory Committee Subcommittee, Drug Abuse Prevention and Education (1986)
Member/Attorney General's Advisory Committee Subcommittee, Legislation (1986)
Member/Attorney General's Advisory Committee Subcommittee, Budget (1985)
Faculty Member/Attorney General's Advocacy Institute, Washington, D.C. (1980-Present)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

I belong to no organizations which lobby before public bodies. Other organizations include:

University of Tulsa College of Law - Adjunct Professor
Member, First United Methodist Church, Tulsa, Oklahoma
Phi Delta Phi
Order of the Curule Chair
Tulsa Law Journal
Sigma Nu
Phi Gamma Kappa

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

State	Federal
Oklahoma Supreme Court, (9-30-77)	Central District of California, (9-16-80)
California Supreme Court, (7-13-81)	Southern District of Florida, (11-80)
District of Columbia Court of Appeals (2-9-78)	Northern District of Oklahoma (12-30-83)
	Ninth Circuit Court of Appeals, (7-29-82)
	Tenth Circuit Court of Appeals, (11-7-84)
	Federal Trade Commission (9-77)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Tulsa Law Journal, Vol. 11 at 241, "The Premium Savings Bond."

Tulsa Law Journal, Vol. 11 at 542, "Standing to Sue in Antitrust: The Application of Data Processing to Private Treble Damage Actions."

Tulsa Law Journal, Vol. 12 at 356, "The Timely Execution of Tulsa County Search Warrants."

I have no speeches on constitutional law or national policy. I have attached copies of press articles which cover talks I have given in the field of drug enforcement.

13. Health: What is the present state of your health?

Excellent.

List the date of your last physical examination.

January 20, 1986
Dr. Simon A. Levit
1725 E. 19th
Tulsa, Oklahoma 74104
(918) 747-8081

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

a. United States Attorney
Northern District of Oklahoma
3600 U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(December 1983 to Present)
Appointed

b. Assistant United States Attorney
Centeral District of California
312 North Spring Street
Los Angeles California 90012
(1980-1983)
Appointed

c. Assistant United States Attorney
Southern District of Florida
155 South Miami Avenue
Miami, Florida 33130
(Nov. 1980-Feb. 1981)
Appointed

d. Trial Attorney
Bureau of Competition
Federal Trade Commission
6th and Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(1977-80)
Appointed

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Upon graduation from the University of Tulsa College of Law in June 1977, I continued for three months my work as an intern with the Public Defender's Office at the Tulsa County Courthouse, where I was allowed to handle criminal jury and non-jury matters with the consent of my indigent clients. In September 1977, I reported to work in Washington, D.C., as an antitrust attorney with the Federal Trade Commission's Bureau of Competition. For three years, from September 1977 to September 1980, I specialized in merger and monopolization investigations and trials. At the same time, I completed two additional years of study at night in the field of antitrust and economics at Georgetown University Law School. In September 1980, I was appointed as an Assistant United States Attorney with the Justice Department in the Central District of California, Los Angeles, where I tried numerous federal criminal cases on behalf of the government for more than three years. During this time, I also served as a Special Assistant United States Attorney in Miami, Florida, for approximately three months, focusing primarily on narcotics trafficking cases and investigations. On

December 30, 1983, I was unanimously appointed interim United States Attorney for the Northern District of Oklahoma in Tulsa by District Judges H. Dale Cook, James O. Ellison, and Thomas R. Brett. On June 15, 1984, I was appointed by President Reagan to serve as the Presidentially-appointed United States Attorney for the Northern District of Oklahoma pursuant to Senator Don Nickles' nomination. I have now served as a United States Attorney in Oklahoma for more than three years.

In short, my ten years of civil and criminal litigative experience is virtually all in federal court as opposed to state court. Moreover, I have litigated federal cases in many districts, including California, Oklahoma, Washington, D.C., Colorado, and Florida. Unlike most United States Attorneys, I personally try most of the major prosecutions in my district.

Due to the types of cases I have litigated, another significant portion of my practice has been devoted to legal writing. In this regard, I have filed dozens of trial and appellate briefs with federal courts throughout the United States, and have argued appellate matters before the Ninth Circuit, the Tenth Circuit, and the Federal Trade Commission in Washington, D.C. Also, since September 1984, I have served as an adjunct professor at the University of Tulsa College of Law, teaching the course entitled "Trial Practice" in six separate semesters.

Additionally, I have devoted substantial time to the training of other practicing attorneys. I am a longstanding faculty member of the Attorney General's Advocacy Institute in Washington, D.C., which trains new Assistant United States Attorneys from all over the United States. Since 1980, I have been asked to serve as a lecturer and faculty member on approximately ten occasions. I have spoken on the topics of trial preparation, federal investigative techniques, grand jury investigations, financial investigations, criminal forfeitures, and prosecutions under the Continuing Criminal Enterprise and RICO statutes. Also, I have addressed the Tulsa County Bar Association on various occasions concerning recent developments in federal criminal and civil practice. Finally, as United States Attorney in Oklahoma, I have also devoted time to public speaking appearances. In this regard I have spoken on approximately two dozen occasions to rotary clubs, church groups, high schools, junior high schools, law enforcement organizations, accounting organizations, and other civic organizations on the topics of narcotics enforcement and white collar crime.

The addresses of the above-referenced employers and agencies, and the supervisors in question, identified by their current addresses and phone numbers, are set forth below:

a. Public Defender's Office (1976-77)
Tulsa County Courthouse
Fifth and Denver
Tulsa, Oklahoma 74103
(918) 584-0471, Ext. 2660

Intern Assistant

Pete Silva, Chief Public Defender

Leslie Earl, Esq.
(Former Chief Public Defender)
1605 South Denver
Tulsa, Oklahoma 74119
(918) 583-1124

b. Federal Trade Commission (1977-80)
Room 272 6th & Pennsylvania Ave., N.W.
Washington, D.C. 20580

Trial Attorney

James H. Sneed, Esq.
Ronald A. Bloch, Esq.
(Former Assistant Directors,
Bureau of Competition)
McDermott, Will and Emery
1850 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-8000

K Keith Thurman, Esq.
(Former Senior Trial Counsel,
Bureau of Competition)
Thurman and Thurman
Beach Tower - Suite 200
3330 Pacific Avenue
Virginia Beach, Virginia 23451
(804) 422-0060

c. United States Attorney's Office (1980-1983)
312 North Spring Street
Los Angeles, California 90012
(213) 894-2434

Assistant United States Attorney

Stephen S. Trott
Associate Attorney General
(Former United States Attorney, Los Angeles)
Department of Justice
Room 4119
10th and Constitution Ave., N.W.
Washington, D.C. 20530
(202) 633-3752

Robert L. Brosio
Chief, Criminal Division
United States Attorney's Office
312 North Spring Street
Los Angeles, California 90012
(213) 894-2434

d. United States Attorney's Office (Nov. 1980-Feb. 1981)
155 South Miami Avenue
Miami, Florida 33130
(305) 350-4471

Special Assistant United States Attorney

Martin R. Raskin, Esq.
(Former Chief, Criminal Division)
Raskin and Graham
744 Northwest 12th Avenue
Suite 200
Miami, Florida 33136
(305) 324-4200

e. United States Attorney's Office (1984-Present)
3600 U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103
(918) 581-7463

United States Attorney

Stephen S. Trott
Associate Attorney General
Department of Justice
Room 4119
10th and Constitution Ave., N.W.
Washington, D.C. 20530
(202) 633-3752

William P. Tyson
Director, Executive Office
for United States Attorneys
10th and Pennsylvania Avenue, N.W.
Room 1619
Washington, D.C. 20530
(202) 633-2121

f. University of Tulsa College of Law
3120 East Fourth Place
Tulsa, Oklahoma 74104
(918) 592-6000

Dean Frank K. Walwer
Associate Dean John F. Hicks

g. Attorney General's Advocacy Institute
Office of Legal Education
Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 633-4104

Thomas G. Schrup, Director

17. b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Time Period	General Character
1976 - 1977	Criminal Defense
Sept. 1977 - Sept. 1980	Federal Civil Antitrust Litigation
Sept. 1980 - Present	Federal Criminal Prosecution with Ancillary Civil Litigation

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

In 1977, prior to reporting to work in Washington, D.C., my clients, as a public defender, consisted of indigents charged with various criminal offenses by the State of Oklahoma. These offenses included burglary, robbery, assault, narcotics, and a wide variety of property and personal crimes.

From September 1977 to September 1980, my client was the United States Government, and more specifically, the Federal Trade Commission. The area of specialization was merger and monopolization investigations and trials.

From September 1980 to the present, my client has been the United States Government, and more specifically, the Department of Justice. As an Assistant United States Attorney in Los Angeles and Miami, I specialized in narcotics trafficking prosecutions with a special emphasis on those traffickers who maintained foreign bank accounts and other assets subject to forfeiture. As United States Attorney in Tulsa, I have continued this specialization, as well as developing considerable expertise in the investigation and prosecution of official corruption and bank fraud cases.

17. c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in court regularly throughout my legal career.

2. What percentage of these appearances was in:

(a) federal courts;

September 1980 - Present - 100 Percent

(b) state courts of record;

1976 - September 1977 - 100 Percent, Tulsa County District Court

(c) other courts.

September 1977 - September 1980 - 100 Percent, Federal Trade Commission

3. What percentage of your litigation was:

(a) civil;

September 1977 - September 1980	100 Percent
September 1980 - Present	5 Percent

(b) criminal;

September 1980 - Present	95 Percent

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 40 trials. A more detailed listing of the identifiable jury and non-jury cases I have tried is set forth below. Even this number, however, substantially understates my trial experience. Two of these trials, for example, were complex antitrust matters which each lasted several months in trial. Also included in this number is a nine-week official corruption/foreign bank account trial, a multi-week extortion and bank fraud trial, and several multi-week (and multi-defendant) narcotics trafficking prosecutions.

LIST OF IDENTIFIABLE TRIALS*

Jury Trials

Case Name	Case Number(s)	District	Role
U.S. v. Stephen Songer	86-CR-19-B	Northern Oklahoma	Chief Counsel
U.S. v. Mose Stephens, Jr.	86-CR-112-C	Northern Oklahoma	Chief Counsel
U.S. V. Wesley R. McKinney	85-CR-69-B	Northern Oklahoma	Chief Counsel
U.S. v. Louis Stallings, _et al_.	85-CR-57-C	Northern Oklahoma	Chief Counsel
U.S. v. Finis W. Smith, _et al_.	84-CR-60-C	Northern Oklahoma	Chief Counsel
U.S. v. R. A. Lotspeich (1st Trial)	84-CR-130-C	Northern Oklahoma	Chief Counsel
U.S. v. R. A. Lotspeich (2nd Trial)	84-CR-130-C	Northern Oklahoma	Chief Counsel

U.S. v. Larry Thompson, et al.	84-CR-106-B	Northern Oklahoma	Chief Counsel
U.S. v. Johnnie L. Harris, et al.	84-CR-58-C	Northern Oklahoma	Sole Counsel
U.S. v. Jesse Jones, et al.	CA, No. 84-1667 83-CR-131-E	Northern Oklahoma	Chief Counsel
U.S. v. Hector Alvarez	CR-83-109-B	Central California	Chief Counsel
U.S. v. Serafin Alfonso, et al.	83-109A-MML	Central California	Chief Counsel
U.S. v. Moses Wellingham, et al.	CR-82-245-LEW	Central California	Chief Counsel
U.S. v. Sherman Wilson	82-715A-LEW	Central California	Sole Counsel
U.S. v. Armando Naranjo, et al.	800-461-CR-JLK	Southern Florida	Sole Counsel
U.S. v. David Donaldson	CR-81-541-MR	Central California	Co-Counsel
U.S. v. Robert Soto, et al.	CA, No. 81-1530 DC, No. 81-564-DVK	Central California	Sole Counsel
U.S. v. Alice Barron	CA, No. 81-1492 DC, No. CR-81-362-JR	Central California	Sole Counsel
U.S. v. Catarino Murillo, et al.	81-363-WPG	Central California	Co-Counsel
U.S. v. Elia Elias, et al.	CR-80-686-MR	Central California	Co-Counsel
State v. Janice Escobedo	CRF-77-825	Tulsa County	Chief** Counsel
State v. Ural Lee Brown	CRF-76-2887	Tulsa County	Chief** Counsel
State v. Kenneth E. Doty, Jr.	CRF-76-2962, 76-2961, 76-1455	Tulsa County	Chief** Counsel

Non Jury Trials

Case Name	Case Number(s)	District	Role
In the Matter of Beatrice Foods	Docket No. 9112	Federal Trade Commission, Washington, D.C.	Chief Counsel
In the Matter of Tenneco Inc.	Docket No. 9097	Federal Trade Commission, Washington, D.C.	Co-Counsel
U.S. v. Ovidio Gomez	82-502-MML	Central California	Sole Counsel
U.S. v. Julio Ardilla	82-29-B	Central California	Sole Counsel
U.S. v. Luis Bravo	82-29-B	Central California	Sole Counsel
U.S. v. Gerald Kassap	82-29-B	Central California	Sole Counsel

LIST OF IDENTIFIABLE TRIALS*

Non Jury Trials
(Continued)

Case Name	Case Number(s)	District	Role
U.S. v. Joseph Peroni	82-29-B	Central California	Sole Counsel
U.S. v. Eduardo Rodriguez	82-29-B	Central California	Sole Counsel
U.S. v. James S. Eberhardt	81-577-RJK	Central California	Sole Counsel
U.S. v. James Leonard Ortego	80-792-RJK	Central California	Sole Counsel

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*As a public defender intern from 1976-1977, and as an Assistant United States Attorney from 1980-1983, I participated in a number of trials which I simply can't recall. For example, as an Assistant United States Attorney, I litigated numerous court trials in narcotics matters where the defendants were preserving suppression and other issues for appellate review. Similarly, as an Assistant United States Attorney, I second-chaired the trials of less experienced assistants. Also, while serving as a public defender, I was allowed to second chair and participate in a number of cases with senior public defenders who were far more experienced than myself. Accordingly, the above list represents the cases which I tried and which I can identify by name from records in my possession or because the case stands out in my mind.

Significantly, this list does not include the many matters I handled in which there was significant pretrial litigation in the form of motions and evidentiary hearings and which then resulted in guilty pleas. Also, this list does not include the numerous matters which were assigned to me after trial and for which I handled all of the post-trial litigation, such as habeas corpus actions and arguments before the appellate courts. Further, this list does not include the many matters for which I handled the litigation from an investigative standpoint (grand jury investigations, wiretaps, beepers, transponders, pen registers, etc.), but did not handle the subsequent trial itself, either due to declination, settlement or assignment to another attorney.

**Pursuant to the Rules of the Supreme Count of the State of Oklahoma on Legal Internship, Title 5, OSA, Ch. 1, App. 6, I handled the entire pretrial and trial proceedings in these cases under the direct supervision of a staff attorney of the Public Defender's Office and with the full consent of the clients involved.

5. What percentage of these trials was:

(a) jury; Fifty Percent

(b) non-jury; Fifty Percent (Note: I have ascribed this percentage to non-jury trials primarily due to the length of the two antitrust trials and the many unidentified narcotics matters referenced above, which were the subject of court trials.)

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

TEN OF THE MOST SIGNIFICANT LITIGATED MATTERS

I.

A. Case Name and Description:

U.S.A. v. Finis W. Smith and Doris L. Smith, Docket No. 84-CR-60-C (N.D. Oklahoma)

This political corruption case presented the prosecution of the former President Pro Temporare of the Oklahoma State Senate and his wife, a Tulsa County tag agent, on 18 counts of mail fraud, tax fraud and failure to disclose foreign bank accounts, arising out of the defendants' illegal manipulation of the Tulsa County motor license tag system. The case was a joint investigation of the Federal Bureau of Investigation, the Internal Revenue Service, the U.S. Customs Service and the U.S. Attorney's office in Tulsa, working in conjunction with the Office of International Affairs in Washington, D.C. The Smiths' foreign bank accounts were obtained by issuing a grand jury subpoena to a domestic branch of a Mexican bank, Bancomer, and by filing a motion to compel the defendants, by way of court order, to sign direction and consent forms authorizing the government to obtain copies of the foreign bank records. This was the first time the Department of Justice had successfully obtained records in this fashion from the country of Mexico. After a nine-week trial, both defendants were convicted on all counts.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I was the government's lead counsel in this case. I supervised and coordinated the grand jury investigation in this matter and supervised the obtaining of the foreign bank records and all attendant negotiations with the Mexican bank. At trial, I gave the government's opening statement, closing argument, rebuttal argument, handled the presentation of one-half of the government's many witnesses and the introduction into evidence of the foreign bank records. I conducted the cross-examination of several key defense witnesses, including the testimony of the defendant, Finis Smith. I also traveled to Mexico to take the foreign deposition of a key defense witness, Gilberto Solbes Picon. This deposition was later introduced into evidence by the government in its case in chief.

D. Disposition of the Case:

Both defendants were convicted on all counts and are now in custody serving 6-year sentences. The defendants did not appeal their convictions. Thus, the case is over and no further litigation is anticipated.

E. Trial Dates or Periods:

September 1985 - November 1985

F. Court and Judge Who Tried the Case:

Honorable H. Dale Cook
Chief Judge
472 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7616

Honorable Joseph Morris
(Former U.S. District Judge, E.D. of Oklahoma)
(Appointed as Special Master for Foreign Deposition in Mexico)
GABLE & GOTWALS
4th National Bank Building
515 South Boulder
Tulsa, Oklahoma 74103

(918) 582-9201

G. Co-Counsel:

Frank H. McCarthy
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

Benjamin F. Baker
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

H. Opposing Counsel:

Carl Hughes, Esq. (Counsel for Finis Smith)
HUGHES & NELSON
5801 North Broadway Extension
Suite 302
Oklahoma City, Oklahoma 73118
848-0111
(405) 528-2300

E. J. Ball, Esq. (Counsel for Doris Smith)
BALL, MOURTON & ADAMS
P. O. Box 1948
Fayetteville, Arkansas 72702

(501) 442-6213

Jeffrey Hill, Esq. (Counsel for Bancomer)
LILLICK, McHOSE & CHARLES
707 Wilshire Blvd.
Los Angeles, California 90017

(213) 488-7100

II.

A. Case Name and Description:

U.S. v. Louis Stallings, et al. - Docket No. 85-CR-57-C

This case presented the prosecution of a major South American/Oklahoma cocaine smuggling network, which specialized in non-stop shipments of large quantities of cocaine into the United States from Colombia, South America. The defendant, Louis Stallings, was charged with supervising a continuing criminal cocaine enterprise, the most serious narcotics offense in the federal criminal code. Specifically, Stallings was alleged to have used his Stallings Aircraft business in Tulsa, Oklahoma, as a front for an international drug smuggling operation. Stallings was convicted on all counts after a lengthy trial and received a 75-year no-parole sentence, the toughest sentence ever handed down in any narcotics case in this district.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I was lead counsel for the government in this case, handling the opening statement, rebuttal argument, the testimony of the government's chief accomplice witness and an equal number of the remaining 25-30 witnesses who testified at trial. The defendant did not testify. I also argued the principal legal motions in this case.

D. Disposition of the Case:

Stallings was convicted on all counts and received a 75-year no-parole sentence. The case was appealed to the Tenth Circuit, which affirmed the defendant's conviction in a published opinion on February 3, 1987 (Slip Opinion No. 85-2475).

E. Trial Dates or Periods:

July 1985

F. Court and Judge Who Tried the Case:

Honorable H. Dale Cook
Chief Judge
472 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7616

G. Co-Counsel:

Keith A. Ward
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

Benjamin F. Baker
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

H. Opposing Counsel:

Ronald H. Mook, Esq.
1518 South Cheyenne
Tulsa, Oklahoma 74119

(918) 583-7094

Thomas E. Salisbury, Esq.
4444 East 66th Street
Tulsa, Oklahoma 74136

(918) 494-4700

III.

A. Case Name and Description:

In the Matter of Tenneco, Inc., Docket No. 9097 - Federal Trade Commission.

This civil antitrust case involved the Federal Trade Commission's challenge under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act to Tenneco, Inc.'s $210 million acquisition of Monroe Auto Equipment Company. This was one of the largest automotive parts mergers of the 1970's, joining Tenneco's Walker Division, the world's largest manufacturer of exhaust systems, with Monroe, the world's largest manufacturer of shock absorbers. The significance of this case was the fact that this was a test case for the "actual potential competition" merger enforcement theory, an economic theory utilized to challenge large product diversification mergers and geographic market extension mergers by conglomerate industrial concerns.

B. Party I Represented:

United States of America, Federal Trade Commission.

C. My Participation in the Litigation:

I served as the second chair government counsel in this case to Mr. K Keith Thurman. There were only two attorneys assigned to the trial of this case, which lasted more than a year. My participation involved extensive direct and cross-examination of numerous industry witnesses and expert witnesses, including economists, accountants, and financial analysts. Also, I was responsible for organizing and introducing into evidence several hundred documentary exhibits. Further, I represented the government in extensive motion practice before the Administrative Law Judge who was assigned to the case. In terms of lawyer workload, I handled approximately one-half of the courtroom litigation in this matter, and handled the majority of the pleading and briefing practice during the trial.

D. Disposition of the Case:

Tenneco prevailed before the Administrative Law Judge, who found that the merger did not violate the antitrust laws. The Federal Trade Commission reversed the Administrative Law Judge, finding that the merger did in fact violate § 7 of the Clayton Act, § 5 of the Federal Trade Commission Act, and ordered divestiture. Both of these decisions are reported at 98 F.T.C. 464 (1981).

Tenneco appealed the Federal Trade Commission's decision to the Second Circuit. The Second Circuit reversed the Federal Trade Commission's divestiture order by a 2-1 decision. This decision is reported at 689 F.2d 346 (2d Cir. 1982). No further appeal was had from this decision and the merger was allowed to stand.

E. Trial Dates or Periods:

This trial lasted from June 12, 1978, to August 29, 1979.

F. Court and Judge Who Tried the Case:

Honorable Thomas Howder
Administrative Law Judge
2120 L Street, N.W.
Washington, D.C. 20580

(202) 254-7727

G. Co-Counsel:

K Keith Thurman
THURMAN & THURMAN
Beach Tower - Suite 200
3330 Pacific Avenue
Virginia Beach, Virginia 23451

(804) 422-0110

H. Opposing Counsel:

John Jeffers
BAKER & BOTTS
1 11 Plaza - Suite 606
Houston, Texas 77002

(713) 229-1234

Alan S. Gover
WEIL, GOTSHAL, MANGES
1600 Republic Bank Center
700 Louisiana
Houston, Texas 77002

(713) 546-5000

IV.

A. Case Name and Description:
U.S.A. v. R. A. Lotspeich, Docket No. 84-CR-130-C

This case presented the prosecution of an attempted extortion involving the horse racing industry in the State of Oklahoma. The case arose out of the defendant's efforts to obtain $2.3 million from a group of Tulsa racetrack investors in exchange for the defendant's alleged influence with the Oklahoma Horse Racing Commission. The case attracted great public interest given the recent enactment of parimutuel racing in Oklahoma, as well as the defendant's position as a member of the Oklahoma Beef Commission and Vice President of the Oklahoma Thoroughbred Association.

B. Party I Represented:
United States of America, Department of Justice

C. My Participation in the Litigation:
I was lead counsel in this case and handled virtually all major aspects of the case, including opening statement, closing argument, rebuttal argument, cross-examination of the defendant, and the direct and cross-examination of the vast majority of the witnesses who testified. I also handled the majority of the pretrial motion litigation in this case and all of the post trial motion litigation in this case. Finally, I prepared the government's brief to the Tenth Circuit Court of Appeals, and argued the case before the Tenth Circuit.

D. Disposition of the Case:
The first trial of this matter resulted in a hung jury, with the jury hanging 11-1 for conviction. The second trial resulted in the defendant's conviction. The defendant is now in custody serving a 10-year sentence. The case was affirmed by the Tenth Circuit on July 14, 1986, in a published opinion (No. 85-2124).

E. Trial Dates or Periods:
January 1985 (first trial - two weeks)
April 1985 (second trial - one week)

F. Court and Judge Who Tried the Case:
Honorable H. Dale Cook
Chief Judge
472 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7616

G. Co-Counsel:
Frank H. McCarthy
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

H. Opposing Counsel:
Bruce Green, Esq.
706 West Okmulgee Ave.
Muskogee, Oklahoma 74401

(918) 683-0309

Joel L. Wohlgemuth, Esq.
909 Kennedy Building
Tulsa, Oklahoma 74103

(918) 583-7571

V.

A. Case Name and Description:

U.S. v. Catarino Murillo, et al. - Docket
No. CR 81-363 (A)-WPG

This case presented the prosecution of a major Mexican heroin distribution organization supervised in Los Angeles by Catarino Murillo. The defendant was charged with conspiring to import, possess and distribute large quantities of Mexican heroin in the Central District of California and elsewhere, as well as several counts of income tax evasion. Murillo was also charged with supervising a continuing criminal heroin enterprise. This was one of the first cases in the Central District of California where the government successfully sought and obtained the criminal forfeiture of a defendant's heroin wealth, including Murillo's luxury mansion in La Habra Heights, his ranch in Pomona, California, several vehicles, jewelry and cash. This was also the first case in which the Justice Department successfully obtained records of a defendant's Mexican bank accounts in a heroin trafficking/income tax evasion case. After a four-week trial, Murillo was convicted on all counts.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I served as the government's co-counsel in this case, along with Irma Gonzales, now a U.S. Magistrate in San Diego. Ms. Gonzales and I were equally responsible for the presentation of this case. We were allowed to each give opening statements and further were allowed to split the closing argument. Each of us presented one of the two major accomplice witnesses who testified and evenly split the remainder of the many witnesses who testified at the trial. After the conclusion of the trial, I personally prepared the government's two appellate briefs to the Ninth Circuit, discussed in further detail below. Moreover, I personally argued the case before the Ninth Circuit Court of Appeals. Further, after affirmance of the conviction, I responded to Murillo's habeas corpus petition. I then argued the habeas case before the Ninth Circuit Court of Appeals.

D. Disposition of the Case:

Murillo was convicted by the jury on all counts after a four-week trial. He was sentenced to 17 years in prison without parole and required to forfeit all of his narcotics-related assets. At the time of his sentencing, the trial judge exempted Murillo's house in La Habra Heights from the jury's special forfeiture verdict in order to provide a home for Murillo's wife and children. The government sought a writ of mandamus from this order. Murillo's conviction was affirmed by the Ninth Circuit in an unpublished opinion on July 5, 1983 (No. 81-1727). Also, the government was successful in its writ of mandamus appeal regarding the property exemption by the district court judge. This opinion is published at 709 F.2d 1298 (9th Cir. 1983). Murillo unsuccessfully sought certiorari from the Supreme Court in both cases. Murillo later filed a petition for writ of habeas corpus, which was dismissed by the district court and likewise rejected by the Ninth Circuit in an unpublished opinion filed July 3, 1986 (No. 84-64-77).

E. Trial Dates or Periods:

October 1981 - November 1981

F. Court and Judge Who Tried the Case:

Honorable William P. Gray
312 N. Spring Street
Los Angeles, California 90012

(213) 894-5265

G. Co-Counsel:

Honorable Irma Gonzales
U.S. Magistrate
U.S. Courthouse
940 Front Street
San Diego, California 92189

(619) 293-5383

H. Opposing Counsel:

Roger Agajanian, Esq.
924 N. Lowell Street
Santa Ana, California 92703

(714) 558-9292

Alvin Michaelson, Esq.
1900 Avenue of the Stars
Suite 2512
Los Angeles, California 90067

(213) 278-4984

VI.

A. Case Name and Description:

U.S.A. v. Wesley R. McKinney, Docket No. 85-CR-69-B

This case presented the prosecution of the former Chairman of the Board of Republic Bank and Trust Company on 32 counts of bank fraud and misapplication of federally-insured banking funds arising out of a $300 million check-kiting scheme. The defendant, who fled the country after the collapse of his financial empire, was arrested in California by F.B.I. agents several months after his indictment. The case attracted substantial attention due to the collapse of the defendant's financial empire in Tulsa, Oklahoma, which resulted in thousands of local depositors losing millions of dollars. Because of the enormous publicity, a change of venue was granted and the case was tried in the Western District of Oklahoma, rather than the Northern District of Oklahoma. After a two-week jury trial, the defendant was convicted on all counts and is now in custody serving a 10-year sentence.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I was lead counsel for the government in this case. In this regard, I supervised the grand jury investigation of McKinney, argued the principal pretrial motions and had the primary litigation responsibility at trial. Specifically, at trial, I gave the government's opening statement, closing argument, conducted the direct examination of McKinney's co-defendant, James Ross, conducted the cross-examination of defendant McKinney himself, and handled the cross-examination of Carl McKinney, the defendant's brother and a key defense witness. I also shared equally in the other trial responsibilities with my co-counsel.

D. Disposition of the Case:

McKinney was convicted by the jury on all counts and is in custody serving a 10-year sentence. McKinney has appealed his conviction to the Tenth Circuit Court of Appeals. No decision has been rendered at this time.

E. Trial Dates or Periods:

December 1985

F. Court and Judge Who Tried the Case:

Honorable Thomas R. Brett
508 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7966

G. Co-Counsel:

Frank H. McCarthy
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

Howard P. Stewart
Trial Attorney, Criminal Division
Fraud Section
U.S. Department of Justice
P.O. Box 7814
Ben Franklin Station
Washington, D.C. 20044

(202) 724-7133

H. Opposing Counsel:

Gary L. Richardson, Esq.
7030 South Yale - Suite 601
Tulsa, Oklahoma 74136

(918) 492-7674

VII.

A. Case Name and Description:

In the Matter of Beatrice Foods - Docket No. 9112,
Federal Trade Commission

This civil antitrust case involved the Federal Trade Commission's challenge to Beatrice Foods' $504 million acquisition of Tropicana Products, Inc. This was the third largest merger of the decade, merging Beatrice Foods, the world's largest diversified food company, with Tropicana, the world's largest citrus processer and chilled orange juice company. The cas involved the allegation that Beatrice Foods had entered and was planning to enter further the chilled orange juice market by independent means prior to its merger with Tropicana, with the merger thus eliminating both actual and potential competition and entrenching the market position of Tropicana. The case involved a novel product market, chilled orange juice, which the Federal Trade Commission alleged to be a separate and distinct submarket from frozen orange juice, canned orange juice and other fruit juices. Also, the case involved the novel allegation of "actual potential entry" by Beatrice into the chilled orange juice market similar to the allegation made in the Tenneco matter discussed supra.

B. Party I Represented:

United States of America, Federal Trade Commission

C. My Participation in the Litigation:

I was assigned to this case as chief trial counsel by Assistant Director for Litigation, James H. Sneed, after the case had been lost at the preliminary injunction stage in federal district court. As chief trial counsel, I organized the case, made the division of labor between myself and my co-counsel and took the case to trial before the Administrative Law Judge assigned to the matter. My participation in the pretrial litigation phase involved extensive deposition practice, all forms of pretrial discovery, including preparing and responding to hundreds of requests for admissions and interrogatories, and arguing numerous motions at the lengthy trial of this matter. I handled the direct and cross-examination of numerous industry witnesses and experts, and supervised the introduction into evidence of several thousand documents.

D. Disposition of the Case:

The government prevailed in the case I tried before the Administrative Law Judge, who found that the merger violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. The Federal Trade Commission reversed the Administrative Law Judge, finding that the merger did not violate the antitrust laws. Both decisions are reported at 101 F.T.C. 733 (1983).

E. Trial Dates or Periods:

This trial lasted from November 29, 1979, until September 2, 1980.

F. Court and Judge Who Tried the Case:

Honorable James P. Timony
Administrative Law Judge
2120 L Street, N.W.
Washington, D.C. 20580

(202) 254-7701

G. Co-Counsel:

Katherine Boland, Esq.
Federal Trade Commission
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Washington, D.C. 20580

(202) 523-3935

Anthalia Lingos, Esq.
Federal Trade Commission
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Washington, D.C. 20580

(202) 254-8644

Timothy B. Walthall, Esq.
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Suite 209
Washington, D.C. 20037

(202) 965-7040

H. Opposing Counsel:

Edward L. Foote, Esq.
John Stack, Esq.
WINSTON & STRAWN
1 First National Plaza
Suite 5000
Chicago, Illinois 60603

(312) 558-5600

VIII.

A. Case Name and Description:

U.S.A. v. Larry Thompson, et al., Docket No. 84-CR-106-BT

This case presented the prosecution of a major Oklahoma methamphetamine manufacturing and distribution network. Defendant Larry Thompson was charged with supervising a continuing criminal methamphetamine enterprise, while the remaining five defendants who went to trial were charged with conspiracy to possess and distribute methamphetamines. All six defendants were convicted after a two-week jury trial. Defendant Larry Thompson received a 15-year no-parole sentence.

B. Party I Represented:
United States of America, Department of Justice

C. My Participation in the Litigation:
I was lead counsel for the government in this case, handling opening statement, rebuttal argument, the government's chief accomplice witness and an equal number of the remaining 25-30 witnesses who testified at trial. I also argued the principal legal motions in this case.

D. Disposition of the Case:
All defendants were convicted on all counts and sentenced to prison. Larry Thompson received a 15-year no-parole sentence, whereas the remaining defendants received sentences ranging from 6 months to 3 years. No appeals were filed by any of the defendants. No further litigation is anticipated.

E. Trial Dates or Periods:
November 1984

F. Court and Judge Who Tried the Case:
Honorable Thomas R. Brett
508 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7966

G. Co-Counsel:
Keith A. Ward
Assistant U.S. Attorney
3600 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7463

H. Opposing Counsel:
D. C. Thomas, Esq. (Counsel for Bob Thompson)
THOMAS & MARTIN
504 Fidelity Plaza
Oklahoma City, Oklahoma 73102

(405) 235-4300

Larry A. Gullekson, Esq. (Counsel for Larry Thompson)
717 South Houston
Tulsa, Oklahoma 74127

(918) 583-1122

M.E. McCollam, Esq. (Counsel for Zachary Montgomery)
CONNER & WINTERS
2400 First National Tower
Tulsa, Oklahoma 74103

(918) 586-5711

Stanley D. Monroe, Esq. (Counsel for Ricky Ellison)
1515 South Denver
Tulsa, Oklahoma 74119

(918) 599-8118

John Dowd, Esq. (Counsel for Ray Thompson)
1025 Thomas Jefferson St., N.W.
East Lobby - Suite 700
Washington, D.C. 20007

(202) 337-7700

James D. Wadley, Esq. (Counsel for Randy Emerson)
P.O. Box 963
McAlester, Oklahoma 74502

(918) 423-4650

IX.

A. Case Name and Description:

U.S.A. vs. Jesse Jones - Docket No. 83-CR-132-E

This case presented the prosecution of a major North Tulsa narcotics distributor, Jesse Jones, who for years had successfully evaded prosecution by state authorities. Jones, through his contacts with the stolen property underground, became the owner of more than one hundred pounds of cocaine which had been stolen from a mini-storage in Tulsa, Oklahoma. Following the receipt of this cocaine, Jones' lifestyle skyrocketed, as evidenced by numerous cash purchases of luxury items. Jones, who had not filed income tax returns for at least ten years, was convicted of numerous federal narcotics violations, including the operation of a continuing criminal cocaine enterprise and was sentenced to 50 years in prison without possibility of parole.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I tried this two-week narcotics prosecution virtually myself, handling the opening statement, closing argument, rebuttal argument, cross-examination of the defendant, the presentation of the majority of the government's case, and the cross-examination of all defense witnesses. One important government witness was handled by my co-counsel, Gerald Hilsher, who left the trial at the end of the first week.

D. Disposition of the Case:

Jones was convicted on all counts and sentenced to 50 years without parole. He appealed to the Tenth Circuit Court of Appeals, which affirmed the conviction in a published opinion on October 10, 1986 (Slip Opinion No. 84-1667). His co-defendants, Terry Strickland and Kinnie Simpson, were convicted on charges of conspiracy to possess and distribute cocaine and possession of firearms during the commission of a narcotics felony. Strickland's conviction was affirmed on appeal, while Simpson chose not to appeal. Darlene Byrd, Jones' girlfriend, was acquitted of the single conspiracy count in which she was charged.

E. Trial Dates or Periods:

March 1984

F. Court and Judge Who Tried the Case:

Honorable James O. Ellison
500 U.S. Courthouse
Tulsa, Oklahoma 74103

(918) 581-7966

G. Co-Counsel:

Gerald Hilsher, Esq.
BARROW, GADDIS, GRIFFITH & GRIMM
610 S. Main, Suite 300
Tulsa, Oklahoma 74119

(918) 584-1600

H. Opposing Counsel:

Anthony M. Laizure, Esq. (Counsel for Jones)
2211 E. Skelly Drive
Tulsa, Oklahoma 74105

(918) 745-6084

E. Melvin Porter, Esq. (Counsel for Jones)
2116 N.E. 23rd Street
Oklahoma City, Oklahoma 73111

(405) 424-1479

Mark Skof, Esq. (Counsel for Byrd)
SKOF & GARNER PA
110 South Main
Broken Arrow, Oklahoma 74012

(918) 258-9365

John H. Charloe, Esq. (Counsel for Strickland)
418 Harvard Tower Building
4815 South Harvard
Tulsa, Oklahoma 74135
(918) 749-3885

Kenn Bradley, Esq. (Counsel for Simpson)
418 Harvard Tower Building
4815 South Harvard
Tulsa, Oklahoma 74135

(918) 749-3885

X.

A. Case Name and Description:

U.S.A. v. Serafin Alfonso, Humberto Rayo, Fabian Mora, Primo Antonio Tellez, et al., Docket No. CR 83-109(A)-MML
U.S.A. v. Hector Mauricio Alvarez, Docket No. CR 83-109(B)-MML

This case presented the prosecution of a Colombian cocaine smuggling ring which imported large quantities of cocaine into the United States through the Gran Colombiana Shipping Lines. The case centered on a large quantity of cocaine which was seized from a freighter prior to the cocaine being lowered into the waters of Long Beach Harbor, where a scuba diver and an unloading crew were awaiting its delivery. The case went to trial against five Colombians allegedly involved in the smuggling ring and involved the use of Spanish wiretap conversations intercepted pursuant to court authorization and presented at trial through interpreters. Due to the granting of a severance as to one defendant, this case resulted in two separate trials. All defendants were convicted on all counts.

B. Party I Represented:

United States of America, Department of Justice

C. My Participation in the Litigation:

I was lead counsel for the government in both trials which resulted from this case, handling the opening statement, rebuttal argument, presentation of the majority of the government's case in chief and cross-examination of the principal defense witnesses. All defendants were convicted on all counts. The appeals of all defendants were processed after I left the U.S. Attorney's Office in Los Angeles.

D. Disposition of the Case:

Defendant Serafin Alfonso was sentenced to 25 years; Defendant Rayo was sentenced to 22 years; Defendant Tellez was sentenced to 15 years; and Defendant Mora was sentenced to 12 years. All defendants appealed.

The convictions of all defendants, with the exception of Alfonso, were affirmed by the Ninth Circuit in an opinion published at 759 F.2d 728 (9th Cir. 1985). Alfonso's conviction was reversed due to the improper admission of Rule 404(b) evidence by the trial court and the case was remanded for retrial as to defendant Alfonso only. Alfonso has since entered a plea of guilty.

Defendant Alvarez was tried separately and sentenced to 15 years' imprisonment. He did not appeal.

E. Trial Dates or Periods:
April 1984

F. Court and Judge Who Tried the Case:
Honorable Malcolm M. Lucas
Associate Justice, Supreme Court of California
(Former U.S. District Court Judge, C.D. California)
350 McAllister Street, Room 4058
San Francisco, California 94102

(415) 557-1862

G. Co-Counsel:
Jeff Russell, Esq.
Narcotic and Dangerous Drug Section
Room 901, Federal Triangle Building
315 9th Street, N.W.
Washington, D.C. 20530

(202) 724-7045

H. Opposing Counsel:
Michael D. Abzug, Esq. (Counsel for Mora)
3400 Wilshire Blvd., Suite 1007
Los Angeles, California 90010

(918) 389-3868

Ingo Brauer, Esq. (Counsel for Alvarez)
111 West St. John Street
Suite 555
San Jose, California 95113

(408) 275-1290

Hector Perez, Esq. (Counsel for Rayo)
600 West Santa Ana Blvd.
Suite 405
Santa Ana, California 92701

(714) 542-3600

Manuel U. A. Araujo, Esq. (Counsel for Tellez)
3440 Wilshire Boulevard
Suite 1007
Los Angeles, California 90010

(213) 389-9271

Earl Hansen, Esq. (Counsel for Alfonso)
205 South Broadway
Suite 902
Los Angeles, California 90012

(213) 626-6831

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

My most significant legal activities have been the forty or more cases I have tried which are referenced above. I participated in one significant piece of litigation from a pretrial standpoint, which was subsequently tried by other attorneys. This case is set forth below:

Case Name and Description:
U.S.A. v. John Z. DeLorean, et al.
No. 82-910-A-RMT

On October 17-18, 1982, defendants John Z. DeLorean, William Morgan Hetrick and Stephen Lee Arrington were arrested on charges of conspiring to import, possess and distribute a large quantity of Colombian cocaine. The defendants were subsequently indicted on October 26, 1982, by a federal grand jury in the Central District of California. In November 1982, I was assigned to assist Assistant U.S. Attorney James P. Walsh in the prosecution of this matter, which involved, among other things, a continuing criminal enterprise charge against defendant Hetrick. From November 1982 to December 1983, I assisted Mr. Walsh in the extensive pretrial litigation of this matter, which resulted in the convictions of defendants Hetrick and Arrington. In December 1983, I was appointed U.S. Attorney in the Northern District of Oklahoma and left the U.S. Attorney's Office in Los Angeles. The DeLorean case went to trial several months later. Assistant U.S. Attorney Robert Perry took my place on the case. From approximately April 1984 - August 1984, Mr. Perry and Mr. Walsh tried Mr. DeLorean, the only remaining defendant in this case. I did not participate in any aspect of the investigation or trial of this matter.

B. Party I Represented:
United States of America, Department of Justice

C. My Participation in the Litigation:
During the thirteen months that I was assigned to this matter, I prepared numerous pleadings and argued numerous matters before the district court judge assigned to this case. The bulk of my litigation experience during this period was devoted to three primary issues.

First, I personally supervised and handled the government's efforts to obtain the foreign banking records of defendant Hetrick's narcotics activities in the Grand Cayman Islands. This resulted in the taking of a foreign deposition, pursuant to Rule 15 of the Federal Rules Criminal Procedure, of the manager of the Royal Bank of Canada in the Grand Cayman Islands. I personally handled this deposition, which was the government's first successful effort to penetrate the bank secrecy laws of the Grand Cayman Islands in a narcotics case. Hetrick subsequently entered pleas of guilty to numerous narcotics violations and agreed to the forfeiture of all of his narcotics related assets.

Second, I personally supervised and handled the government's appeal of a discovery order issued by the trial judge. Judge Takasugi had ordered numerous federal agencies to produce thousands of documents to DeLorean and his counsel under the Freedom of Information Act prior to his criminal trial without any showing of materiality or relevance. The government successfully sought a writ of mandamus as to this order from the Ninth Circuit. United States v. United States District Court, 717 F.2d 478 (9th Cir. 1983). I personally handled this matter before the district court, drafted the appellate brief to the Ninth Circuit and argued the case in the court of appeals.

Third, I personally handled the extensive polygraph evidentiary hearings held in this matter. DeLorean sought to introduce polygraph evidence in the form of a polygraph test he took from a privately retained polygrapher. Several expert witnesses testified that DeLorean's polygraph test, which was taken in secrecy without notice to the government, was unreliable. These witnesses included the president of the

American Polygraph Association, the chief U.S. Army polygrapher, the chief F.B.I. polygrapher, a nationally recognized polygrapher who trained the polygrapher that administered DeLorean's examination, and other experts in the field of polygraphy. As a result of this litigation, DeLorean was required to take a polygraph examination administered by the F.B.I, which was fully recorded and which DeLorean's counsel was allowed to attend.

After DeLorean failed the F.B.I. polygraph examination on the issue of entrapment, the government sought to have this examination admitted into evidence if polygraph examinations were to be the subject of evidence at trial. At the same time, the government urged, consistent with Justice Department policy, that polygraph examinations had no place in criminal trials. Judge Takasugi, a former polygrapher himself, ruled at the end of several weeks of evidentiary hearings that DeLorean's polygraph test was not reliable and would be excluded at trial. Accordingly, the government did not offer into evidence the examination which DeLorean failed, and no polygraph evidence was introduced at trial.

D. Disposition of the Case:

Hetrick and Arrington were convicted prior to my departure in December 1983.

DeLorean was subsequently acquitted on all counts, although I did not participate in his trial.

E. Trial Dates or Periods of Litigation:

November 1982 - December 1983

F. Court Judge Who Tried the Case:

Honorable Robert Takasugi
U.S. District Judge
312 N. Spring Street
Los Angeles, California 90012

(213) 894-5858

Honorable Charles B. Renfrew
(Former U.S. District Judge, N.D./California)
(Special Master, Grand Cayman Deposition)
Chevron Corporation
225 Bush Street
San Francisco, California 94104

(415) 894-7700

G. Co-Counsel:

James P. Walsh
Assistant U.S. Attorney
312 North Spring Street
Los Angeles, California 90012

(213) 894-2699

H. Opposing Counsel:

Howard L. Weitzman, Esq. (Counsel for DeLorean)
2049 Century Park, East
Suite 1400
Los Angeles, California 90067

(213) 277-8366

H. Opposing Counsel (cont'd):

Honorable Stephen R. Wilson (Counsel for Hetrick)
U.S. District Judge
312 N. Spring Street
Los Angeles, California 90012

(213) 894-4327

Richard M. Barnett, Esq. (Counsel for Arrington)
108 Ivy Street
San Diego, California 92101

(619) 231-1182

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I will automatically be recused from any case involving the Andrews-Davis law firm, which my wife is associated with. The transfer of any such cases from my docket will be handled by the clerk's office in the Western District of Oklahoma.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   No

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not Applicable

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		
Cash on hand and in banks	SEE ATTACHED	
U.S. Government securities—add schedule	None	
Listed securities—add schedule	None	
Unlisted securities—add schedule	None	
Accounts and notes receivable:		
Due from relatives and friends	None	
Due from others	SEE ATTACHED	
Doubtful	None	
Real estate owned—add schedule	SEE ATTACHED	
Real estate mortgages receivable	None	
Autos and other personal property	SEE ATTACHED	
Cash value—life insurance	SEE ATTACHED	
Other assets—itemize:	SEE ATTACHED	
Total assets	272,400	00

LIABILITIES		
Notes payable to banks—secured	SEE ATTACHED	
Notes payable to banks—unsecured	SEE ATTACHED	
Notes payable to relatives	None	
Notes payable to others	None	
Accounts and bills due	None	
Unpaid income tax	None	
Other unpaid tax and interest	None	
Real estate mortgages payable—add schedule	SEE ATTACHED	
Chattel mortgages and other liens payable	SEE ATTACHED	
Other debts—itemize:	SEE ATTACHED	
Total liabilities	204,050	00
Net worth	68,350	00
Total liabilities and net worth	272,400	00

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	None
On leases or contracts	SEE ATTACHED
Legal Claims	None
Provision for Federal Income Tax	None
Other special debt	None

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	SEE ATTACHED
Are you defendant in any suits or legal actions?	SEE ATTACHED
Have you ever taken bankruptcy?	NO

(PAGE 42 MISSING)

ANNUAL STATEMENT OF MORTGAGE LOAN ACCOUNT

ACCOUNT NO. 26-023882-0
DATE JANUARY 1, 1986 THRU DECEMBER 31, 1986

LAYN R PHILLIPS
10014 S MAPLEWOOD PL
TULSA OK 74136

MIDAMERICA FEDERAL
SAVINGS AND LOAN ASSN.
P. O. BOX 3499
TULSA, OK 74101

TRANSACTION DATE		TRANSACTION AMOUNT	TRANS. CODE	BREAKDOWN OF MONTHLY PAYMENT							LOAN BALANCE
MO	DA			PRINCIPAL	INTEREST	LATE CHARGE	[illegible]			ESCROW	
01	16	459.56-	25	.00	.00					459.56	121,794.32
02	04	1,324.51	1	58.34	1,027.64		02	01	86	238.53	121,735.98
03	12	1,324.51	1	58.83	1,027.15		03	02	86	238.53	121,677.15
04	09	1,313.00	1	59.33	1,026.65		04	03	86	227.02	121,617.82
05	06	1,313.00	1	59.83	1,026.15		05	04	86	227.02	121,557.99
06	16	1,313.00	1	60.33	1,025.65		06	05	86	227.02	121,497.66
07	16	1,313.00	1	60.84	1,025.14		07	06	86	227.02	121,436.82
08	13	1,313.00	1	61.36	1,024.62		08	07	86	227.02	121,375.46
09	15	1,313.00	1	61.87	1,024.11		09	08	86	227.02	121,313.59
10	09	1,313.00	1	62.40	1,023.58		10	09	86	227.02	121,251.19
11	18	1,313.00	1	62.92	1,023.06		11	10	86	227.02	121,188.27
11	25	518.00-	40	.00	.00					518.00	121,188.27
12	04	1,995.00-	30	.00	.00					1,995.00	121,188.27
12	26	459.56-	25	.00	.00					459.56	121,188.27
12	31	1,313.00	1	63.45	1,022.53		12	11	86	227.02	121,124.82
12	31	1,356.44	1	63.99	1,021.99		01	12	87	270.46	121,060.83

INTEREST PAID THIS YEAR 12,298.27 TAX PAID THIS YEAR 1,995.00

TRANSACTION CODES

1. PAYMENT	6 PAYOFF	35 MISCELLANEOUS TAX
2 PRINCIPAL	9 PREPAYMENT FEE	40 HAZARD INSURANCE
3 INTEREST	15 LOAN LIFE INSURANCE	50 LIFE INSURANCE
4. LATE CHARGE	20 GENERAL ESCROW	60 DELINQUENT TAX
5. CONSTRUCTION OR CLOSING INTEREST	25 MORTGAGE INSURANCE	65 DELINQUENT INSURANCE
	30. PROPERTY TAX	70 ACCRUED INTEREST

RC DENOTES RETURNED CHECK

BEG ESCROW BALANCE	1,019.05
END ESCROW BALANCE	377.66

IMPORTANT NOTICE
THE AMOUNT OF INTEREST YOU HAVE PAID 12,298.27 IS BEING REPORTED TO THE INTERNAL REVENUE SERVICE THE AMOUNT SHOWN IS DEDUCTIBLE BY THE INTEREST PAYER FOR FEDERAL INCOME TAX PURPOSES ONLY TO THE EXTENT THE PAYER PAID THE AMOUNT AND WAS NOT REIMBURSED BY ANOTHER PERSON

THE INFORMATION IS BEING REPORTED UNDER TIN # 447-54-0980

RUN DATE 01/05/87 10:08 MM20447-00F

GENERAL INFORMATION:

Attachment

Question: Are you defendant in any suits or legal actions?

Answer: Yes

I have been sued on only one occasion. I have been named as a defendant in a suit by a criminal defendant who was successfully prosecuted by my office. The suit is a case where I have never met the defendant, nor did I handle any of the litigation associated with his multiple convictions in this district. I appear to have been named by virtue of my position. A brief description of the case is set forth below:

R. James Woolf v. Thomas W. McLain, *et al.*
Case No. 85-C-1033-E, Northern District of Oklahoma

This is a Bivens action in which the plaintiff complains of certain activities of the Federal Bureau of Investigation, the United States Probation Office, the United States Attorney's Office, and a United States District Judge, touching almost every aspect of a criminal investigation and prosecution of the plaintiff. The defendants include the United States Attorney, the United States District Judge, an Assistant United States Attorney, a Federal Probation Officer, and two special agents of the Federal Bureau of Investigation, one of whom is the Special Agent in Charge of the Tulsa Office.

The plaintiff, who has undergone court-ordered psychiatric evaluation in Springfield, Missouri, has filed three actions challenging the activities that are the subject of the present action. The present action is completely frivolous and it is anticipated that it will be dismissed on the basis of the defendants' official immunity and the lack of merit to the suit. The other two actions have already been dismissed, either voluntarily or by the Court, when plaintiff was required to provide sworn proof of his allegations.

The criminal charges against plaintiff involved forged checks written on a Liberian bank. As a part of his defense, plaintiff alleged that he underwent a name change in Liberia and that he was therefore not properly named in the indictment. During the course of his criminal trial, a writing exemplar was sought from plaintiff. He feigned dyslexia. Plaintiff goes by a number of different aliases. He has been found carrying several bogus I.D.'s, including a license to fly jet aircraft issued in Liberia. He is also known to have impersonated an attorney, a Drug Enforcement Administration Agent, and an Arkansas State Trooper. Plaintiff was convicted of the criminal charges against him and was subsequently convicted of additional criminal fraud charges. His conviction was unanimously affirmed by the Tenth Circuit, and he is now serving time in the Federal Correctional Institution in El Reno, Oklahoma.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The issue of judicial activism is neither a conservative nor liberal issue, nor can it be confined to the political labels of "right" or "left." Rather, the criticism applies to any judge, who, regardless of philosophical outlook, attempts to twist the law to fit his own social preconceptions, or, as is more commonly the case, one who attempts to substitute his judgment for that of the legislature.

The proper role of a judge under our Constitution is not difficult to discern. The Constitution provides for the adoption of laws by the elected representatives of the people of the United States. Our democratic system is thus grounded on the legislative process, not a "government by judiciary." The federal judiciary was assigned a narrow and limited role at the time of our nation's founding. Their function was then, and is today, to seek out the meaning of the Constitution and the laws passed by Congress, and, in the case of federal district judges, to implement the decisions of higher courts. In doing so, judges must interpret the law as written, whether they personally like it or not, carrying out their function to say what the law is, rather than what they think it should be, and apply that law to the facts of particular "cases" or "controversies" presented to them.

The controversy surrounding judicial activism has stemmed from members of the federal judiciary who are perceived as having reached beyond their authority. I agree with the words of the late Justice Felix Frankfurter, who said:

> ". . . there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused to so enthrone the judiciary." [Baker v. Carr, 369 U.S. 186, 270 (1962)].

Unlike our nation's elected representatives, the federal judiciary never faces the voters. Appointed for life, they must fulfill their duty as faithful guardians of the Constitution, with deference to the notion that citizens must be able to govern themselves through their elected representatives.

Judicial activists, in my opinion, are those judges who interpret the law to reach the result they want, regardless of constitutional text, legislative intent, or judicial precedent. This theory of judging, unfortunately, makes a judge more of a legislator or policy planner than a judge. Irrespective of whether these judicial actions are carried out in the furtherance of "conservative" or "liberal" philosophies, this form of judging ignores our government's carefully planned system of checks and balances, and is properly criticized as "judicial activism."

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged?

My service with the Public Defender's Office in Tulsa County is described above. During my tenure in this position, I was an advocate on behalf of indigent clients, usually attempting to safeguard individual privileges and freedom from improper government intrusion. Similarly, in my career as a prosecutor, I have always strived to fulfill my ethical obligation to protect the innocent and to convict fairly the guilty.

Recd. 2/6/87

AMERICAN BAR ASSOCIATION

Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

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and Member-at-Large
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SECOND CIRCUIT
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Chicago, IL 60611

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P.O. Box 80268
Lincoln, NE 68501

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Seattle, WA 98101

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February 3, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: LAYN R. PHILLIPS
United States District Court
Western District of Oklahoma

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Layn R. Phillips for appointment as Judge of the United States District Court for the Western District of Oklahoma.

A substantial majority of our Committee is of the opinion that Mr. Phillips is "Qualified" for this appointment. The minority found him to be "Not Qualified."

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

ROYCE C. LAMBERTH

Birth:	July 16, 1943	San Antonio, Texas
Legal Residence:	Virginia	
Marital Status:	Married	Janis Jost Lamberth
Education:	1961 - 1964	University of Texas B.A. degree (1966)
	1963 (summer)	Texas Southmost College
	1964 - 1967	University of Texas Law School LL.B.
Bar:	1967 1974	Texas District of Columbia
Military Service:	1967 - 1974	United States Army Judge Advocate General's Corps
Experience:	1974 - present	United States Attorney's Office District of Columbia
		Assistant U.S. Attorney Civil Division (1974 - 1977)
		Assistant Chief Civil Division (1977 - 1978)
		Chief Civil Division (1978 - present)
Office:	Judiciary Center Building Room 4804 Washington, D.C. 20001 202 272-9185	
Home:		

To Be United States District Judge for the District of Columbia

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RECEIVED MAR 2 3 1987

Senate Judiciary Committee
Questionnaire for Judicial Nominees

I. Biographical Information (Public)

1. Full name (include any former names used).

1.A. Royce Charles Lamberth

2. Address: List current place of residence and office address(es).

2.A. Residence:

Office:

Chief, Civil Division
United States Attorney's Office
Judiciary Center Building, Room 4804
Washington, D.C. 20001
(202) 272-9185

3. Date and place of birth.

3.A. July 16, 1943; San Antonio, Texas

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

4.A. I married Janis Kay Jost Lamberth on June 17, 1979. Prior to our marriage, my wife taught at the elementary school level in San Antonio, Texas. Since our marriage, my wife has not worked outside the home.

5. Education: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

5,A. University of Texas, Austin, Texas; September 1961 - June 1964, 3 year undergraduate pre-law program; received Bachelor of Arts degree after first year of law school.

Texas Southmost College, Brownsville, Texas; June - July 1963; took summer school course in Spanish Literature.

University of Texas Law School, Austin, Texas; September 1964 - August 1967. Received B.A. January 1966; LL.B. August 1967.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

6.A.	1966 - 1967	The University of Texas School of Law, Austin, Texas. I was a Teaching Assistant, instructing first year law students in Legal Writing and Oral Advocacy.
	1967 - 1974	Military Service, U.S. Army
	1974 - present	U.S. Attorney's Office, District of Columbia, Washington, D.C.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

7.A. I served from December 8, 1967 to May 27, 1968, as a Private in the U.S. Army, Serial No. RA 15961259. I was discharged on May 27, 1968, and directly commissioned on May 28, 1968 as a Captain in the Judge Advocate General's Corps, U.S. Army, Service No. 463-72-4155. I served until February 20, 1974, when I was released from active duty to join the U.S. Attorney's Office. My discharges were honorable, both from enlisted status and from officer status.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

8.A. Special Achievement Award, presented on behalf of Attorney General Edwin Meese III, March 3, 1986

John Marshall Award, presented by Attorney General William French Smith, July 2, 1981

Special Commendation Award, presented by Attorney General Edward H. Levi, December 14, 1976

Nomination for 1973 Younger Federal Lawyer Award, signed by Major General George S. Prugh, The Judge Advocate General of the Army; Major General Harold E. Parker, The Assistant Judge Advocate General; and Brigadier General Bruce C. Babbitt, Assistant Judge Advocate General for Civil Law

Meritorious Service Medal with Oak Leaf Cluster, February 20, 1974, for service at the Pentagon

Bronze Star with Oak Leaf Cluster, December 3, 1970, for service in Vietnam

Air Medal, May 10, 1970, for combat service in Vietnam

Army Commendation Medal, October 15, 1969, for service at Fort Bragg, North Carolina

Harold J. Sullivan Award from the Assistant United States Attorneys Association, 1986

Certificate of Appreciation, National Aeronautics and Space Administration, January 7, 1986

Honorary Faculty, Army Judge Advocate General's School, December, 1980

Director's Award, U.S. Secret Service, 1984

Certificate of Appreciation from the President's Reorganization Project, signed by President Jimmy Carter, June 1979

Outstanding Committee Chairman for FY1979, Federal Bar Association, September 28, 1979

Certification of Appreciation, Bar Association of the District of Columbia, June 15, 1977

Consul (Honorary Award Upon Graduation), the University of Texas Law School, 1967

Permanent President, Class of 1967, the University of Texas Law School

American Jurisprudence Award for Highest Grade in Appellate Advocacy, the University of Texas Law School, 1967
Valedictorian, South San Antonio High School, 1961

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

9.A. State Bar of Texas, December 4, 1967 to present

District of Columbia Bar, March 21, 1974 to present

District of Columbia Bar Association, June 11, 1974 to present

Chairman, Military Law Committee, July 1982 - June 1984

Federal Bar Association, January 1971 to present

Chairman, Federal Litigation Section - October 1986 to present

Chairman, Federal Rules Committee, October 1985 - September 1986

Deputy Chairman, Council on the Federal Lawyer, October 1980 - September 1983

Chairman, Career Service Committee, October 1978 - September 1980

American Bar Association, December 1967 to present

Chairman, Armed Services and Veterans Affairs Committee, Section on Administrative Law, July 1982 - June 1984

Vice-Chairman, Armed Services and Veterans Affairs Committee, Section on Administrative Law, July 1979 - June 1982

Member of each Judicial Conference of the District of Columbia Circuit, 1978 to present

Member, Arrangements Committee, Judicial Conference of the District of Columbia Circuit, 1985

Member, Ad Hoc Committee on Attorney's Fees, District of Columbia Circuit and District Courts, 1983 - 1984

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

10.A. Alpha Phi Omega - Service Fraternity

Phi Delta Phi - Legal Fraternity

Tejas Club - Social Club at the University of Texas

Association for Criminal Law Studies - University of Texas Law School

Student Assembly - The University of Texas

Board of Governors - University of Texas Law School

Moot Court Board - University of Texas Law School

Student Council - South San Antonio High School (Chaplain)

Band - South San Antonio High School (Drum Major)

Students Against Communism - South San Antonio High School (Chairman); later, Chairman of Students Against Communism of all San Antonio High Schools

Order of De Molay - San Antonio, Texas

South San Antonio Baptist Church - San Antonio, Texas

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

11.A. Supreme Court of Texas, December 4, 1967
Superior Court of the District of Columbia, March 4, 1974
District of Columbia Court of Appeals, May 1, 1974
U.S. District Court for the District of Columbia, June 10, 1974
U.S. Court of Appeals for the District of Columbia Circuit, April 15, 1974
U.S. Supreme Court, April 29, 1974
United States Court for Berlin, May 28, 1979

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

12.A. I have not written any books, articles, or reports that have been published. Attached are copies of two speeches I delivered to Federal Bar Association luncheons in 1986.

13. Health: What is the present state of your health? List the date of your last physical examination.

13.A. Excellent; December 9, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

14.A. I have never held judicial office.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

15.A. Not applicable since I have never been a judge.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

16.A.

1968 - 1974	-	Captain, Judge Advocate General's Corps, U.S. Army
1974 - present	-	Assistant United States Attorney, District of Columbia

Both positions were appointive. I have never been a candidate for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
   (a) jury;
   (b) non-jury.

17.A. a. (1) I did not serve as a law clerk. Although I had been selected for a clerkship, my draft board could not defer me for a year.

(2) I have never been in private practice.

(3)

March - June 1968	Office of the Staff Judge Advocate, Fort Gordon, Georgia After completion of Army basic training as an enlisted man at Fort Dix, New Jersey, I was assigned to the JAG Office at Fort Gordon pending final processing of my application for a direct commission in the Judge Advocate General's Corps. I assisted trial counsel in court-martial cases, including a significant circumstantial evidence murder case which I co-tried.
June 1968 - October 1969	Office of the Staff Judge Advocate, Hq., XVIII Airborne Corps, Fort Bragg, North Carolina

Shortly after I was commissioned, I was reassigned to Fort Bragg, North Carolina, where I served as a Legal Assistance Officer, providing legal advice to soldiers and dependents, for several months. I also served as procurement legal counsel and later was Chief of the Procurement Law Division for several months. During this period, I also prosecuted or defended over 100 court-martial cases of all types, including riot, rape, robbery, larceny, assaults, drug offenses, and various other military crimes.

November 1969 -
May 1970

Office of the Staff Judge Advocate, 1st Cavalry Division (Airmobile), Republic of Vietnam

During the first half of my tour in Vietnam, I prosecuted or defended over 100 cases, including murder, rape, robbery, larceny, and various military offenses, particularly disobedience of orders to go into combat. Particularly noteworthy was my successful defense of 6 soldiers on a Ranger team who were accused of war crimes. I also served as a Military Affairs Officer, advising commanders and various staff officers regarding the legality of proposed actions.

May 1970 -
November 1970

Office of the Staff Judge Advocate, U.S. Army Support Command, Saigon, Republic of Vietnam

During this period I prosecuted or defended another 100 cases of all types, including murders, assaults, and a large number of drug offenses as well as other military offenses. During this time, I was Chief of the Legal Support Activity for this large headquarters, supervising 7 other attorneys who were also prosecuting and defending a wide variety of cases.

November 1970 -
March 1972

Office of the Judge Advocate General, Litigation Division, Department of the Army, Washington, D.C.

During this period I was an action attorney assigned to work with Department of Justice attorneys and U.S. Attorneys throughout the country in defending the Army and its officials when they were sued in federal court. The cases involved personnel seeking release from the Army, personnel seeking to prevent the Army from discharging them, attacks on the Constitutionality of Army regulations and Army policies and procedures, efforts to enjoin courts-martial or collaterally attack convictions, etc. In some cases, I wrote litigation reports. In most cases, I prepared pleadings and briefs which were usually filed by U.S. Attorneys with little, if any, substantive changes. I was frequently sent all over the country to argue cases which the Army deemed significant.

April 1972 -
February 1974

Office of the Judge Advocate
General, Litigation Division,
Department of the Army
Washington, D.C.

Before my Army tour expired I was promoted to be Assistant Chief of the Personnel Law Branch of the Litigation Division, where I supervised 3 other attorneys who were also handling Army litigation with U.S. Attorneys all over the country. I also personally handled many of the cases the Army considered most significant, including all cases attacking the authority of the Secretary of the Army to involuntarily release Reserve officers from active duty as the Vietnam War wound down.

February 1974
May 1977

Civil Division, U.S. Attorney's
Office, Washington, D.C.

As a line attorney, I was responsible for a large volume of cases in which I defended the United States and/or its officials against attacks of unlawful or unconstitutional actions. Noteworthy cases involved defense of CIA and Army intelligence operations in Europe, admission of women to the military academies, class actions involving cut-offs of Social Security benefits, etc.

May 1977 -
September 1978

Assistant Chief, Civil Division,
U.S. Attorney's Office,
Washington, D.C.

I became a supervisor over all civil litigation in the U.S. Attorney's Office, but during a major part of this period I was detailed to work at the Attorney General's Office and at the Office of Management and Budget on the President's Reorganization Project, Federal Legal Representation Study. I

	served on a small task force that studied how lawyers in the federal government could be better organized.
October 1978 - Present	Chief, Civil Division, U.S. Attorney's Office Washington, D.C. I am responsible for coordinating with the Justice Department, the White House, and the General Counsels of all federal agencies, representation of the United States and its officials in all civil litigation in the District of Columbia. I supervise over 30 Assistant U.S. Attorneys, who are currently handling over 3,000 cases at any time. In addition to my supervisory duties, I have continued to personally handle some major cases, such as litigation to stop anti-satellite weapons testing, attacks on the President's authority to make budget reductions, and First Amendment challenges to White House security and demonstration regulations. I also supervise virtually all of the class action employment discrimination cases against federal agencies since they are generally brought in the District of Columbia.

b. (1) I have now spent over 18 years in litigation, as described above. During my Army assignments before the Pentagon, I mostly prosecuted or defended individual court-martial cases. Since 1970 when I was re-assigned to the Pentagon, I have exclusively litigated in U.S. District Courts and U.S. Courts of Appeal, representing the United States and its agencies and officials.

(2) I have specialized in federal court litigation. My clients include the United States and its agencies, as well as numerous federal government officials who are sued individually. During my Army assignments at Fort Bragg and in Vietnam, I also served as defense counsel for soldiers accused of criminal offenses. I also was called upon as a field judge advocate to provide legal assistance to soldiers who needed it, such as drafting wills, contesting debts, etc.

c. (1) I appear in court frequently, but as Chief of the Civil Division of the U.S. Attorney's Office since 1978, my appearances are now usually limited to our most significant and difficult civil cases since I have a staff of 31 other attorneys that I supervise. During the period when I was detailed to the President's Reorganization Project, my court load was reduced and I only argued a handful of cases that I had been previously assigned. During my tenure as a line Assistant U.S. Attorney, I was in court virtually every other day. As a JAG attorney at the Pentagon, I had a courtroom appearance at least two or three times a month somewhere in the country. In Vietnam and at Fort Bragg, I was in trial of criminal cases virtually every day. At Fort Gordon, I had one lengthy trial of a murder case.

(2) 100% in federal courts since 1971; 100% in military courts from 1968 - 1971.

(3) 100% civil since 1971; 100% criminal from 1968 - 1971.

(4) 300 as sole counsel in military courts; 15 as Chief Counsel in federal courts. This federal court figure of 15 actual trials is somewhat misleading, however, since over 95% of all the government's civil cases in the District of Columbia are decided on motions to dismiss or for summary judgment, and I have personally argued over 200 such dispositive motions. Additionally, this does not take into account motions for temporary restraining orders and motions for preliminary injunctions, which are frequently filed in the District of Columbia and which I frequently argue for the government.

(5) 100% non-jury in federal courts; 25% jury, 75% non-jury in military courts

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

18.A. I am listed as counsel in over 400 reported opinions in F. Supp. and F.2d, and I have supervised the government's defense in literally thousands of other cases. The following selection is necessarily very subjective, and I list chronologically ten of the most significant litigated matters I have personally handled:

(1) Levy v. Parker, Habeas No. 1057 (M.D. Pa. 1971), rev'd 478 F.2d 772 (3rd Cir. 1973), rev'd sub. nom. Parker v. Levy, 417 U.S. 733 (1974): Levy was an Army doctor who refused to train medics to go to Vietnam. He was tried and convicted by the military for disobedience of orders, as well as uttering public statements designed to promote disloyalty and disaffection among the troops, and conduct unbecoming an officer by wrongfully and dishonorably making intemperate, defamatory, provoking, contemptuous, disrespectful and disloyal statements to enlisted personnel. After exhausting his appeals within the military - having earlier been denied relief by the civilian courts until his military remedies were exhausted - Levy filed this habeas corpus action alleging that his constitutional rights were violated by his court-martial. I briefed and argued the case in District Court, and the petition was denied. On appeal, I briefed and argued the case in the U.S. Court of Appeals for the 3rd Circuit. The 3rd Circuit reversed, finding that Levy's First

Amendment rights had been violated, and striking down as unconstitutional two Articles of the Uniform Code of Military Justice. I assisted the Solicitor General's office in preparing the Supreme Court briefs. Solicitor General Robert A. Bork personally argued the case in the Supreme Court, underscoring the significance to the military services of the thousands of cases which would be affected. Justice Rehnquist wrote the opinion of the Supreme Court, overturning the 3rd Circuit decision and upholding the constitutionality of the military articles, as well as setting forth an important holding that First Amendment protection for military personnel may be different than that for civilians. This remains one of the most important precedents for the military today.

(a) District Court, 1971; Court of Appeals argument December 12, 1972; Supreme Court argument February 20, 1974 (I was released from the Army later that day, my release having been delayed to assist the Solicitor General in preparing for the argument.)

(b) Chief U.S. District Judge Michael H. Sheridan, U.S. District Court for the Middle District of Pennsylvania; U.S. Circuit Judges Ruggero J. Aldisert and Max Rosenn and Chief Circuit Judge Collins J. Seitz, U.S. Court of Appeals for the 3rd Circuit; U.S. Supreme Court.

(c) Counsel for Levy: Charles Morgan, Jr., Morgan Associates, Chartered, Suite 300, 1899 L Street, N.W., Washington, D.C. 20036, (202) 466-7000.

(c) I represented Warden Jacob J. Parker, the Warden of the U.S. Penitentiary at Lewisburg, Pennsylvania, who was custodian of Levy when the habeas corpus petition was filed, as well as Stanley R. Resor, who was Secretary of the Army.

(2) Hodges v. Callaway, (M.D. Ga. 1973), 499 F.2d 417 (5th Cir. 1974):

After General Westmoreland, as Chief of Staff of the Army, decided to conduct an administrative review of the duty performance of all soldiers who were at My Lai, Vietnam, at the time of the massacre on March 16, 1968, it was decided to administratively discharge Sergeant Hodges. I was assigned to handle all litigation around the country arising from this review. I briefed and argued the case brought by Hodges in the Middle District of Georgia, and won on the merits. At oral argument in the Fifth Circuit, the panel queried why the Army had not raised an argument on exhaustion of administrative remedies. (General Westmoreland had been anxious for a judicial decision upholding his decision on the merits, and the District Judge had agreed.) I asked to file a supplemental brief, which I did, and the Court of Appeals subsequently issued an opinion on exhaustion of administrative remedies which remains today one of the most important and most often cited precedents when civilian courts are reviewing military actions.

(a) I argued the case in District Court in 1973. I orally argued to the 5th Circuit on February 5, 1974, my last oral argument before I left the Army.

(b) Chief U.S. District Judge Robert Elliott; U.S. District Court for the Middle District of Georgia; U.S. Circuit Judges John Minor Wisdom and Irving L. Goldberg and Senior U.S. District Judge Seybourn H. Lynne (N.D. Ala; sitting by designation), U.S. Court of Appeals for the Fifth Circuit.

(c) Counsel for Plaintiff: Frank T. Martin, 828 Broadway, Columbus, Georgia 31901, (404) 324-7371.

(d) I represented the Secretary of the Army and the Commanding General of Fort Benning, Georgia.

(2) Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C. 1974), rev'd sub. nom. Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974):

Plaintiffs were Congressmen who wanted to appoint women to the Air Force and Naval Academies, and women who wanted to attend the Academies. They challenged the constitutionality of refusing to admit women. I filed affidavits from the Deputy Secretary of Defense and the Superintendents of the Army, Air Force, and Naval Academies indicating that the purpose of the service academies at that time was to train combat leaders, and since women were excluded by statute from serving in combat positions, the admission policies were not unconstitutional. the District Court granted summary judgment in the government's favor, but the Court of Appeals reversed and remanded for a full trial on the merits, finding that summary judgment was inappropriate. Shortly thereafter, Congress passed a statute re-defining the purpose of the service academies and admitting women. This litigation was thereupon dismissed as moot.

(a) I argued the motions in the District Court in May, 1974. I presented oral argument in the Court of Appeals on October 30, 1974.

(b) U.S. District Judge Oliver Gasch, U.S. District Court fot the District of Columbia; Chief U.S. Circuit Judge David L. Bazelon and Circuit Judges J. Skelly Wright and Carl McGowan, U.S. Court of Appeals for the District of Columbia Circuit.

(c) Counsel for Plaintiffs: Thomas S. Martin, 1301 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 783-4300.

(c) I represented the Secretary of Defense, Secretary of the Air Force, Secretary of the Navy, the Chiefs of Staff of the Air Force and Navy, and the Superintendents of the Air Force Academy and the Naval Academy.

(4) Berlin Democratic Blub, et al. v. Rumsfeld, et al., 410 F. Supp. 144 (D.D.C. 1976): Plaintiffs in this complicated class action, represented by the American Civil Liberties Union, mounted a major constitutional challenge to Army intelligence activities overseas. Review and modification of numerous Army intelligence programs occurred as a direct result of this litigation, on which I worked closely with the General Counsel of the Defense Department, the Secretary of the Army, and the General Counsel of the Army, as well as State Department and Central Intelligence Agency officials. The reported decision, denying the

government's motion to dismiss, established a number of principles about the extent to which the Constitution follows the flag. Numerous issues of wiretapping, mail opening, and other surveillance activities were presented, along with difficult First Amendment, Fourth Amendment, and Sixth Amendment problems. After denial of the motion to dismiss filed on behalf of all defendants, separate counsel were hired at government expense to represent each of the six individually sued Army officials because of conflicts of interest. I continued to represent the official defendants. Ultimately, after an interlocutory appeal on official immunity, I successfully negotiated one of the most complicated settlements our office has ever seen. This included searching, sealing, and segretating millions of Army files, as well as policy and regulatory changes and payment of damages.

(a) I argued the motion to dismiss or for summary judgment in the District Court in 1975. The case was finally settled in 1980.

(b) Chief U.S. District Judge William B. Jones presided over this case through the ruling reported above, until his death, when the case was reassigned to U.S. District Judge Louis F. Oberdorfer, U.S. District Court for the District of Columbia.

(c) Counsel for Plaintiffs: John H.F. Shattuck, then National Staff Counsel, American Civil Liberties Union, now General Counsel, Harvard University, Massachusetts Hall, Cambridge, Massachusetts 01238, (617) 495-1703, and Mark Lynch, then Staff Counsel, American Civil Liberties Union, now at Covington and Burling, 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004, (202) 662-5544.

(d) Originally I represented all defendants, including the Secretary of Defense, the Secretary of the Army, and various Army officials. After denial of the dispositive motion filed on behalf of all defendants, separate counsel were retained as follows: Paul L. Friedman, White and Case, Suite 500, 1747 Pennsylvania Avenue, N.W., Washington, D.C. 20006, (202) 872-0013, who represented Major General (later Lieutenant General) Harold R. Aaron, the Assisant Chief of Staff of the Army for Intelligence; Roger Zuckerman and Roger Spaeder, Zuckerman, Taylor & Spaeder, 1201 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 775-1440, who represented Colonel Richard Evers, Intelligence Group Commander; N. Richard Janis, Janis, Schuelke & Wechsler, 1728 Massachusetts Avenue, N.W., Washington, D.C. 20036, (202) 861-0600, who represented Mr. David Wales, Intelligence Officer; J. Theodore Wieseman, 22 W. Jefferson Street, Rockville, Maryland 20850, (301) 294-1310, who represented Lt. Col. Gaspar V. Abene, Intelligence Battalion Commander, and Jacob A. Stein, 1800 M Street, N.W., Washington, D.C. 20036, (202) 737-7777, who represented witness William Beall.

(5) Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, et al., Civ. No. 76-0530 (D.D.C.):

This is the most complicated Freedom of Information Act case ever handled by our office, with difficult Administrative Procedure Act and Privacy Act questions as well. At the request of the General Counsel of the Department of Defense, and over the express objections of many in the military services involved, I negotiated a consent decree that opened reading rooms at the Pentagon and made available to public viewing hundreds of thousands of decisional documents from the military discharge boards and the boards for the correction of military records. Additionally, I negotiated new procedures requiring statements of reasons for military decisions. Again, this was in accordance with policy guidance from the Secretary of Defense personally. Unfortunately, from the time the consent decree was entered, in 1977, until contempt proceedings were initiated in 1982, we had numerous compliance problems. The new administration's General Counsel of the Defense Department asked me to try to personally negotiate a settlement of the contempt proceedings and to obtain the approval of the Chief Judge, which I did successfully. The procedures of these military boards has changed dramatically as a result of this litigation, and public access and understanding has improved immeasurably.

(a) Stipulation of Dismissal, January 31, 1977; Settlement Agreement & Order, July 30, 1982.

(b) Chief U.S. District Judge Aubrey E. Robinson, Jr., U.S. District Court for the District of Columbia.

(c) Counsel for Plaintiffs: David F. Addlestone, and Barton F. Stichman, Vietnam Veterans of America Legal Defense Fund, 20001 S Steet, N.W., Suite 710, Washington, D.C. 20009, (202) 686-2599.

(d) I represented the Secretary of Defense, the Secretary of the Army, the Secretary of the Air Force, the Secretary of the Navy, and other military officials.

(6) Jackalone v. Andrus, Civil Action No. 79-3140 (D.D.C.), Cir. No. 79-2359 (D.C. Cir. 1979): Shortly after Americans were taken hostage in Iran, Iranian students sought demonstration permits in Washington, D.C. Because of the volatile situation in Iran, President Carter decided that such demonstrations should not be allowed in front of the White House or in Lafayette Park, since there was a clear potential for violence and this would present a clear and present danger of retaliation against the American hostages. The Iranian students, represented by the American Civil Liberties Union, filed suit to enjoin the Park Service from denying the requested demonstration permit. At an emergency hearing on November 16, 1979, before Chief Judge Aubrey Robinson, I produced testimony regarding the potential for violence by the Deputy Chief of the Park Police and the Deputy Chief of the Metropolitan Police. Deputy Secretary of State Warren Christopher also testified regarding the potential danger to the hostages, and the President's foreign policy concerns. Although I argued against the temporary restraining order, Chief Judge Robinson granted it. I was present when Attorney General Benjamin Civiletti telephonically briefed President Carter on the outcome of the court proceedings, and at the direction of the

President, Attorney General Civiletti instructed me to immediately prepare and file an appeal and seek an emergency hearing in the Court of Appeals. I did so, filing a brief on Saturday, November 17. the ACLU replied on Sunday, November 18, and the Court of Appeals convened an emergency hearing on Monday, November 19. I argued the case to the Court of Appeals, which then recessed while I prepared a letter detailing the alternative demonstration sites that the government was willing to make available. The Court of Appeals thereafter reconvened and upheld the government's actions, determining that there was "an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran." Thereafter, until the hostages were released at the time of President Reagan's Inauguration, I remained responsible for coordinating for the White House, State Department, and Justice Department, with all of the police agencies in Washington regarding all pro- and anti-Iranian demonstrations.

(a) I argued in the District Court and presented witnesses at an evidentiary hearing on November 16, 1979. I argued in the Court of Appeals on November 19, 1979.

(b) Chief U.S. District Judge Aubrey E. Robinson, Jr., U.S. District Court for the District of Columbia; U.S. Circuit Judges J. Skelly Wright, Harold Leventhal, and Roger Robb, U.S. Court of Appeals for the District of Columbia Circuit.

(c) Counsel for Plaintiffs: David Landau, 101 W. Jefferson Street, Rockville, Maryland 20850, (301) 762-1717, Mark Lynch, Covington and Burling, 1201 Pennsylvania Avenue, N.W. Washington, D.C. 20004, (202) 662-5544. Counsel for Co-Defendants (District of Columbia, Mayor Barry, Police Chief Jefferson): Judith W. Rogers, then Corporation Counsel, now Judge, District of Columbia Court of Appeals, and John H. Suda, then Deputy Corporation Counsel, now Judge, Superior Court of the District of Columbia.

(d) I represented the Secretary of the Interior and the Regional Director of the National Park Service, who were the named federal defendants.

(7) Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980 (en banc)), reversing 594 F.2d 244 (D.C. Cir. 1979):

This was a class action employment discrimination case against the Department of Labor which had been settled on the merits before trial, and the amount of attorney's fees was litigated. The government appealed from the District Court's award before I became Chief of the Civil Division, and I was not directly involved until after the panel decision in the Court of Appeals, which was in the government's favor. Public interest groups were in an uproar, and many Justice Department officials thought we should confess error and/or agree to rehearing en banc. The United States Attorney at the time (Earl J. Silbert) and I secured the support of Griffin Bell, who was then Attorney General, and filed a memorandum opposing rehearing. We argued that the fee award was indeed clearly excessive, and that the case should be remanded. Nevertheless, the case was taken en banc, and I presented the oral argument to the Court (after being mooted by Benjamin Civiletti, who had then become Attorney General). Although the Court of Appeals ultimately ruled en banc to overturn the panel opinion and affirm the fee award, attorney fee standards were set for all future cases after hearing the best arguments the government could muster.

(a) I presented the en banc argument in the Court of Appeals on October 9, 1979.

(b) All active judges on the U.S. Court of Appeals for the District of Columbia Circuit participated.

(c) Counsel for Plaintiffs: John R. Hopper, Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, New York 10005, (212) 422-3000; and John H. Pickering, Wilmer, Cutler & Pickering, 1666 K Street, N.W., Washington, D.C. 20006, (202) 872-6000. Also on the briefs, all from Wilmer, Cutler & Pickering, were Lloyd N. Cutler, J. Roger Wollenberg, Gary D. Wilson, Mary A. McReynolds, and John H. Harwood II.

Counsel for amicus curiae Equal Employment Opportunity Commission, Lutz A. Prager, now Assistant Deputy Corporation Counsel, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 727-6252.

Counsel for amicus curiae American Civil Liberties Union, et al., Charles R. Halpern, 600 New Jersey Avenue, N.W., Washington, D.C. 20001, (202) 624-8390.

Counsel for amicus curiae Lawyers Committee for Civil Rights Under Law, David M. Dorsen, Sachs, Greenbaum & Tayler, 1140 Connecticut Avenue, N.W., Suite 900, Washington, D.C. 20036, (202) 828-8200.

Richard Seymour, 1400 I Street, N.W., Washington, D.C., (202) 371-1212.

Roderic V.O. Boggs, 1400 I Street, N.W., Washington, D.C., (202) 371-1212.

Ann K. Macrory, 1400 I Street, N.W., Washington, D.C., (202) 371-1212.

Counsel for amicus curiae NAACP Legal Defense and Education Fund, Inc., James M. Nabrit.

Charles Stephen Ralston, 99 Hudson Street, 16th Floor, New York, New York 10013, (202) 219-1900.

Counsel for amicus curiae Law Office of Bruce J. Terris: Bruce J. Terris, Terris & Sunderland, 1121 12th Street, N.W., Washington, D.C. 20005, (202) 682-2100.

Counsel for amicus curiae, Capital Legal Foundation: James R. Richards, 700 E Street, S.E., Washington, D.C., (202) 546-5533.

(d) I represented the Secretary of Labor and other Labor Department officials.

(8) Fontaine v. Donovan, Civil Nos. 81-789 & 81-800 (D.D.C. 1981), aff'd sub nom. West Central Missouri Rural Development Corporation, et al. v. Donovan, et al., 659 F.2d 199 (D.C. Cir., 1981):

After President Reagan took office and decided on initial budget reductions, this was the first major court test of his authority, under the Impoundment Control Act, to defer or rescind budget authority. Directly at stake in this case was the deferral of $606 million in spending of Labor Department funds, plus rescission of another $234.5 million. Ultimately at stake, however, were billions of dollars of forthcoming budget reductions if the President's authority was upheld. Working closely with White House and Office of Management and Budget officials, I supervised the briefing and personally argued the case in District Court, where the President's actions were upheld. On appeal, I supervised preparation of the brief, but the oral argument was presented by Whitney Adams, an Assistant U.S. Attorney under my supervision. The Court of Appeals affirmed, thereby establishing an important precedent for President Reagan's budget-cutting measures.

(a) District Court argument April 16, 1981; Court of Appeals argument July 1, 1981.

(b) U.S. District Judge John H. Pratt, U.S. District Court for the District of Columbia; U.S. Circuit Judges Edward A. Tamm, George E. MacKinnon, and Ruth Bader Ginsburg, U.S. Court of Appeals for the District of Columbia Circuit.

(c) Counsel for Plaintiffs: Alan Morrison, 2000 P Street, N.W., Washington, D.C. 20036, (202) 785-3704.

James L. Feldesman, 2101 L Street, N.W., Washington, D.C. 20036, (202) 466-8960.

Charles L. Reischel, Deputy Corporation Counsel, 1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 727-6252.

(d) I represented Raymond J. Donovan, Secretary of Labor, David Stockman, Director of the Office of Management and Budget, and other Labor Department and OMB officials.

(9) Lee v. Kelley, 99 F.R.D. 340 (D.D.C. 1983), aff'd sub. nom. Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir., 1984):

While the Senate was considering legislation to create a national holiday in honor of Dr. Martin Luther King, Jr., Senator Jesse Helms sought a court order unsealing the tapes and transcripts of FBI electronic surveillance of Dr. King. Significant questions of congressional standing were raised, which I briefed and argued successfully in the District Court. The Court of Appeals refused to grant a stay, as did the Supreme Court, later the same day. The Senate thereupon voted, and legislation finally passed making Dr. King's birthday a national holiday. Subsequently, I supervised the appellate briefing on whether the case was then moot, but my Appellate Counsel then argued the mootness point in the Court of Appeals. Again, the government prevailed.

(a) I argued in the District Court on October 18, 1983.

(b) U.S. District Judge John Lewis Smith, Jr., U.S. District Court for the District of Columbia, U.S. Circuit Judges J. Skelly Wright, and Patricia M. Wald and Senior U.S. Circuit Judge Carl McGowan, U.S. Court of Appeals for the District of Columbia Circuit.

(c) Opposing counsel, representing Senator Helms, were Lawrence J. Straw, Jr., Straw & Gilmartin, 11377 West Olympic Boulevard, 10th Floor, Los Angeles, California 90064, (213) 312-3293, and William J. Olson, Smith, Olson, Gilman & Pangia, 1815 H Street, N.W., Washington, D.C. 20006, (202) 466-5100.

Counsel for the Southern Christian Leadership Conference were Wiley A. Branton, Sidley & Austin, Suite 600, 1722 I Street, N.W., Washington, D.C. 20006, (202) 429-4000.

William L. Robinson, Lawyers Committee for Civil Rights Under Law, 1400 I Street, N.W., Washington, D.C. 20006, (202) 371-1212.

(d) I represented the Director of the Federal Bureau of Investigation, the Administrator of the General Services Administration and the Archivist of the United States.

(l) Brown, et al. v. Weinberger, et al., Civil No. 85-2867 (D.D.C.):

Four Congressmen and the Union of Concerned Scientists filed this action to enjoin the Secretary of Defense and the Secretary of the Air Force from conducting the test of an anti-satellite (ASAT) weapon in outer space, claiming that the President had filed to comply with a certification provision in the Department of Defense Authorization Act. Because the first summit meeting between President Reagan and General Secretary Gorbachev was about to take place, it was critical to the foreign policy objectives of the current Administration that this ASAT test take place as scheduled. In one day, I put together a 30 page brief arguing that the doctrines of standing and political question barred relief, and that in any event plaintiffs had filed to meet the legal standards to obtain a temporary restraining order to block the test. I argued the case before the District Court on September 12, 1985. The District Judge ruled in the government's favor, later issuing a 7 page memorandum opinion. The test was conducted in the Pacific Ocean on September 13, and the Geneva Summit went forward as planned.

(a) The case was heard on September 12, 1985.

(b) U.S. District Judge Norma Holloway Johnson, U.S. District Court for the District of Columbia.

(c) Counsel for Plaintiffs: Ellyn R. Weiss, Harmon & Weiss, 2001 S Street, N.W., Washington, D.C. 20009, (202) 328-3500.

(d) I represented the Secretary of Defense and the Secretary of the Air Force.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

19.A. Since 1978, Ihave had the privilege of serving as Chief of the Civil Division of the largest U.S. Attorney's Office in the country. Because of our unique location in the Nation's Capital, many of the government's most important civil cases are litigated here, where there are numerous public interest groups. Many cases are of first impression, often challenging government programs of national significance. The caseload of the court to which I am being nominated is predominantly review of government agency action, and my most significant legal activity has been that I am responsible for supervising the government's position in civil litigation in the court to which I am being nominated. I have had this responsibility under both the Carter Administration and the Reagan Administration, and I worked closely with officials of both Administrations. I am proud of the reputation our Civil Division has established for professionalism and competence through both Administrations, and I consider that even more significant than the individual cases that I have personally litigated.

II. Financial Data And Conflict Of Interest (Public)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

1.A. I have none, other than (1) my current position as an Assistant United States Attorney, which I will resign upon confirmation; (2) my wife and I jointly own a one-bedroom condominium in Ocean City, Maryland, which we offer for weekly rentals through Coastal Realty of Ocean City, Maryland. We have never rented to anyone we know, and all funds go through Coastal Realty, and (3) IRA's in USAA Sunbelt Mutual Funds and certificates of deposit at Chase Bank of Maryland and Dominion Federal Savings & Loan.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

2.A. I will closely examine the statute governing recusal of federal judges and ensure that I follow the applicable law. Since I have simply been a salaried government attorney, I do not anticipate many conflicts of interest other than in cases in which I have personally participated either as a supervisor whose name was on the pleadings or as an active attorney. I will, of course, disqualify myself from those cases.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

3.A. No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

4.A. No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

5.A. Upon confirmation by the Senate, I will resign my position as Assistant United States Attorney and thus have no further connection with the Executive Branch of the government.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

6.A. A net worth statement is attached.

Confidential Financial Statement
Net Worth
Royce C. Lamberth and Janis Jost Lamberth

Assets

Cash on Hand and In Checking Accounts	$	500.00
Money Market Account, Dominion Federal S&L		2,298.56
Certificate of Deposit, Dominion Federal S&L		12,792.79
IRA's - Chase Bank Certificates of Deposit		2,790.00
IRA's - USAA Mutual Funds		2,250.00
Vested Interest in Texas Teachers Retirement Fund -(Janis Jost Lamberth)		18,852.31
Vested Interest in Civil Service Retirement Fund -(Royce C. Lamberth)		41,100.41
1982 Mercury Grand Marquis		6,075.00
1986 Mercury Grand Marquis		16,000.00
Diamond Ring		3,000.00
Furniture and Personal Property in Home		7,000.00
Residence, 8 E. Alexandria Avenue, Alexandria, Virginia		120,000.00
Condo, #404, 2 80th Street, Ocean City, Md.		82,500.00
Other Asset: Judgment Against Towne Cleaners		213.00
	$	315,372.13

Liabilities

Car Loan, Department of Justice Creidt Union	$ 14,500.00
Loan on Residence	47,500.00
Loan on Condo, Chase Bank of Maryland	71,000.00

Account, Maryland Bank	4,498.48
Account, Chevy Chase Savings & Loan	4,676,05
Account, Bank of Virginia	2,282.13
Account, Sovran Bank	1,570.24
Account, USAA Savings Bank	2,168.45
Account, American Airlines	1,074.45
Other Credit Card Accounts	1,691.23
Total Liabilities	$ 150,961.03
Net Worth	$ 164,411.10
Total Liabilities and Net Worth	$ 315,372.13

General Information

Mortgage on Residence at 8 E. Alexandria Avenue is held by Meritor Savings Bank. 30 years at 8½%, from May 1975.

Mortgage on Condo at Ocean City is held by Chase Bank of Maryland, 30 years, 12½%, adjustable every 3 years at 2%, with 6% lifetime cap, from November 1984.

New Car Loan from Department of Justice Credit Union, 9.9% for 5 years.

All other loans are unsecured.

Not guarantors, endorsers, or co-makers on any loans or other obligations.

Never taken bankruptcy.

III. General (Public)

1. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

   (a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   (b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   (c) A tendency by the judiciary to impose broad, arrifmative duties upon governments and society;

   (d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

1.A. I agree with the criticism of judicial activism. I have attached a copy of a speech I gave to a Federal Bar Association luncheon in 1986 on "the Duty of Government Lawyers to Curb Judicial Activism."

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide _pro bono_ legal representation to the disadvantaged.

2.A. As a government attorney, I have been prohibited from providing _pro bono_ services. I am proud, however, as a government attorney, to have had the opportunity to ensure equal justice under law as I have performed my duties.

For example, I have personally approved (and secured higher level approval of) a large number of settlements of employment discrimination lawsuits (including some major class actions) where it appeared that government officials had in fact discriminated--sometimes unwittingly, sometimes not--against employees or applicants for employment. In tort cases, in Freedom of Information Act and Privacy Act cases, and numerous other types of cases, I take seriously my obligation to see that the government treats its citizens fairly.

I have also been very concerned about ensuring equal employment opportunity in connection with my duties as a supervisor. For example, in its history, the Civil Division, prior to my appointment as Chief, never had more than one black attorney. We now have five, plus one Hispanic, and I continue to try to increase the number of minority attorneys that we employ.

JUDICIARY COMMITTEE

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March 23, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ROYCE C. LAMBERTH
United States District Court
for the District of Columbia

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Royce C. Lamberth for appointment as Judge of the United States District Court for the District of Columbia

A substantial majority of our Committee is of the opinion that Mr. Lamberth is "Well Qualified" for this appointment. The minority found him to be "Qualified."

Sincerely,

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

CONFIRMATION HEARING ON RICHARD BENDER ABELL AND VERNE L. SPEIRS

WEDNESDAY, MAY 20, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present. Senator Specter.

The CHAIRMAN. The hearing will come to order. I have an opening statement, but I'll forego it and insert it in the hearing record. Welcome my friends from Virginia and from California. Gentlemen.

[The opening statement of Chairman Joseph Biden follows:]

OPENING STATEMENT OF JOSEPH R. BIDEN, JR.

I welcome both of the nominees and their families and friends to this hearing. The nominees, if confirmed, will be directing programs that I have supported for many years, and that I think are essential to this country's effort to reduce crime, juvenile delinquency, and drug abuse in America.

Unfortunately, the administration has consistently opposed most of these programs and once again has targeted them for elimination in the President's budget proposal for fiscal 1988. And that's why this hearing today is so important. Despite the administration's opposition, despite attempted recissions and deferrals, Congress consistently has provided funding for these programs. In doing so, Congress has relied on the administrators of these programs to implement them as they were enacted.

The purpose of today's hearing is to determine whether Congress can rely on these two nominees to carry out the important duties of administering the Office of Justice Programs and the Office of Juvenile Justice and Delinquency Prevention. Congress—rightfully—expects them to fulfill these responsibilities, notwithstanding the administration's opposition to these programs.

In the past, I opposed the confirmation of Mr. Speirs's predecessor at the Office of Juvenile Justice and Delinquency Prevention because I believed he was appointed to dismantle that office. I also was not persuaded that he believed in the programs he was responsible for leading and would be an advocate within the department for these programs. Based on Mr. Regnery's track record, I am afraid my original concerns were valid.

Today, I have no reason to believe that either Mr. Abell or Mr. Spiers has been nominated solely to dismantle their respective agencies. But once again, given the administration's opposition to most of the programs that Mr. Abell and Mr. Speirs will be directing, I am concerned about their commitment and their enthusiasm for these programs. I will be interested in their answers to the following questions:

1. Do they believe in the basic purpose of the offices they are being appointed to head?
2. Will they be vigorous advocates for these programs?
3. Will they look for new initiatives and new programs to implement the purposes of their offices—or will they merely wait each year to see whether Congress or the President wins the battle over the continuation of these programs? and,

4. Do they have the background and experience necessary to fulfill their responsibilities.

As I mentioned before, I strongly support the programs that both have been nominated to lead. In fact, today I will introduce the "Criminal and Juvenile Justice Partnership Act of 1987," which will reauthorize through 1992 all of the programs that Mr. Abell and Mr. Speirs will administer. With proper direction and leadership, I think these programs can continue to make significant contributions to this Nation's efforts to reduce crime, juvenile delinquency, and drug abuse.

I look forward to discussing these issues with you in depth today.

STATEMENT OF HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Mr. Chairman, I thank you. I'd like to submit my statement on behalf of Mr. Abell. I have known him for some time, privileged to recommend to the President his nomination. Mr. Specter will join me this morning since this fine nominee here shared life in two of our states. The thing that impresses me the most about this nominee is that he has truly worked his way up through many positions in law enforcement, education, and actual hands-on work and he has distinguished himself for many years now in the Department of Justice. I unequivocally urge the Committee and the Senate as a whole, to confirm this nomination. I thank the Chair.

The CHAIRMAN. I know you have other things. Thank you for taking the time, John.

[The statement of Senator John Warner follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Good morning, Mr. Chairman, members of the committee.

Thank you for giving me the opportunity to appear before you today to support the President's nomination of Richard Bender Abell to be Assistant Attorney General for Justice Programs.

I am pleased to join you and our colleagues from Pennsylvania as you consider confirming Mr. Abell for this position.

Among the many pleasures I have as a United States Senator from Virginia is that I represent many fine professionals who serve this country as Federal employees.

Though they may often come here from other States, they live and vote—and often work—in Virginia.

As a 6 year resident and voter in Virginia, Rick Abell is such a person.

Rick has a long and distinguished background in Federal service, and in law enforcement particularly.

I have endeavored to support and encourage that service wherever possible.

As you know, Mr. Chairman, Rick has served in the Office of Justice Programs since 1983 as Deputy Assistant Attorney General, and is currently Acting Assistant Attorney General for Justice Programs.

As such, he brings considerable experience to a host of programs which are of key importance to this committee and vital service to the Nation.

As a former assistant district attorney, deputy sheriff and adjunct faculty member of the Delaware Law School—a point I'm sure has not gone unnoticed by the Senator from that great State—Rick brings the necessary experience to the operation and oversight of the Juvenile Justice, National Institutes of Justice, Bureau of Justice Assistance, Office of Victims of Crime and Bureau of Justice Statistics Programs.

His résumé really requires little amplification.

Rick is joined today by his wife Lucia and his daughter Rachel.

One son, David, is currently in Florida, and the second son, Christian, is currently at the Fork Union Academy in Virginia.

Again, Mr. Chairman, thank you for extending me this courtesy.

I heartily support Richard Abell's nomination.

The CHAIRMAN. Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Wilson**. Thank you, Mr. Chairman. Mr. Chairman, it's my great pleasure this morning to introduce to the committee Verne L. Speirs, a long-time resident of California, prior to his coming to Washington to serve in the Administration. Mr. Speirs has been nominated by the President for the position of Administrator of the Department of Justice's Office of Juvenile Justice and Delinquency Prevention. He is extraordinarily well-suited for this position. He's had extensive experience with various juvenile and criminal justice positions, including extensive probation experience, work with the California State Board of Corrections, with the Sacramento County Law and Justice Agency, and with the California State Office of Criminal Justice Planning. So his experience has been extraordinary.

For three years, from 1975 to 1978, Mr. Speirs was in charge of planning and program development for the Sacramento County Department of Probation. In that position, as a supervising probation officer, he was responsible for planning and managing grant programs for juvenile and adult offenders. He has also had one-on-one experience in supervising and treating abused and exploited children as well as serious juvenile offenders as a probation officer with both the Santa Clara County and Sacramento Departments of Probation. He's also been a teacher. He's held teaching positions with Los Rios Community College District and Golden Gate University where he taught courses in the juvenile justice area. And although experienced with and very sensitive to the problems of juvenile offenders, he's also had broad experience on the other side of the coin as well. As Administrator of the Office of Justice Programs, Office of Victims of Crime, he's worked to implement strategies for providing for the needs of innocent victims of crime, including abused and exploited children.

In short, Mr. Chairman, Verne Speirs' experience in the juvenile justice field makes him exceptionally well-qualified to serve as the Administrator of the Office of Juvenile Justice and Delinquency Prevention. There is a world of experience, as I have indicated in these brief remarks. I think, in addition to his obvious professional competence and preparation, he enjoys an enviable reputation for probity, for high integrity, and among his colleagues, he is deservedly known as a dedicated professional who has been involved in, I think, real pioneering efforts to improve the lot of children, be they victims of crime or those tempted to commit it or those for whom society has the responsibility for rehabilitation. So I think we are privileged this morning to have a singularly well-qualified nominee in every respect.

The **Chairman**. I thank you and you can improve Senator, if you would, the lot of a parent if, on your way out, you'd turn around and say hello to my son, who's sitting right behind you, Beau Biden. It would make things work a lot better for me, now that I have embarrassed him in front of his class.

I thank you. You are welcome to stay, obviously, Senator, but I know you have many things to do. Mr. Speirs is fortunate to have you speaking on his behalf.

Senator WILSON. Thank you, Mr. Chairman

The CHAIRMAN. Thank you, Senator. I appreciate it very much.

Mr. Abell, I have a brief opening statement that regards both you and Mr. Speirs and I will take a moment to make that and then we will proceed. I would like to welcome you. By the way, is your family with you today?

Mr. ABELL. Yes, sir, they are, Senator.

The CHAIRMAN. Would you introduce your family?

Mr. ABELL. My wife, Lucia.

The CHAIRMAN. Hi, Lucia.

Mr. ABELL. And my daughter, Rachel.

The CHAIRMAN. Hello, Rachel.

Mr. ABELL. My two sons could not be here today since they are in school.

The CHAIRMAN. Well, thank you for coming. You must be proud of your dad today. This will be painless, I can assure you.

I would like to welcome you and I would like to suggest to both the nominees that, if confirmed, you will be directing programs that I have been very supportive of for many years—programs that I think are essential for this country's effort to reduce crime, juvenile delinquency, and drug abuse in this country.

Unfortunately, you probably also are fully aware and have been briefed on my disagreement with this Administration which has consistently opposed most of these programs. And once again, in the budget that has been sent to us, they have targeted them for elimination in fiscal year 1988. And that is why the hearings today are so important to me and to this committee. Despite the Administration's opposition and despite attempted recisions and deferrals, Congress has consistently provided funding for the program that you hopefully are going to administer. And in doing so, Congress has relied on the Administrators of these programs to implement as Congress enacted them into law.

The purpose of today's hearing is to determine whether or not we can rely on you and your colleague to carry out the important duties of administering the Office of Justice Programs and the Office of Juvenile Justice and Delinquency Prevention.

Congress, I think rightfully, expects you to fulfill these responsibilities, notwithstanding the Administration's opposition to the programs. In the past, I opposed the confirmation of Mr. Speirs' predecessor of the Office of Juvenile Justice and Delinquency Prevention because I believed he was appointed to dismantle the office. I did not oppose him because he was a bad man or a good man but I have voted against nominees in the Carter Administration, in the Ford Administration, in the Nixon Administration, and in this Administration who in fact have been appointed for the express purpose of dismantling a program that they are to run. You may think my assertion harsh, but I believe that was the intention of this Administration's last appointment. I was also not persuaded that the last director of the program for which your colleague is going to be the nominee, quite frankly, believed that the program made any sense.

Today, I have no reason to believe that either you or Mr. Speirs have been nominated solely to dismantle your respective agencies. But once again, given the Administration's opposition to most of the programs that you will be directing, I am concerned about your commitment and your enthusiasm for these programs. And I am going to be very interested in your answering the following questions, both you and your colleague. Do you believe that the basic purpose of the offices you are being nominated for are worthwhile? Will you be a vigorous advocate for these programs? Will you look for new initiatives and new programs to implement the purposes of your office or will you merely wait each year to see whether or not the Congress or the President wins the battle over continuation of the program? And finally, do you have the background and experience necessary to fulfill your responsibilities? As I mentioned before, I strongly support the programs that both of you have been nominated to lead. In fact, today I will introduce the Criminal and Juvenile Justice Partnership Act of 1987 which will re-authorize, through 1992, all of the programs that both you and your colleague will administer. With proper direction and leadership, I think these programs can continue to make significant contributions to the Nation's effort to reduce crime, juvenile delinquency, and drug abuse.

I see my distinguished colleague from Pennsylvania has come in who has also had a keen and long-standing interest in this area, both as a district attorney, a private citizen, and as a United States Senator. I yield to my colleague from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman. I regret a somewhat late arrival on the Metroliner, but I had to be in Philadelphia last night where I had a substantial interest in the primary election.

The CHAIRMAN. Did you congratulate Wilson for me?

Senator SPECTER. I was a driver for one of the candidates last night.

The CHAIRMAN. You do know that Senator Specter's wife is, if not the most, one of the most respected members of the City Council and one who everyone thought should be mayor. Some of us think she should be senator.

Senator SPECTER. Senator Heinz is not going to like that. [Laughter.]

The CHAIRMAN. That is who I was referring to.

Senator SPECTER. But, those duties kept me in Philadelphia last night and the Metroliner was just a tad late this morning, but I am glad to be here and I thank the distinguished Chairman for yielding to me and I had planned to join in the introduction of Mr. Abell and I am pleased to see him nominated for the position as acting as Assistant Attorney General for the Office of Justice Assistance because his background is a very good one to dig into the very tough problems that are posed for this office. He has served as Assistant District Attorney in Chester County and I do not know of any office which is tougher or better preparation and really more rewarding, than being an Assistant District Attorney. I think perhaps if you traced careers, you would find more distinguished careers started as Assistant District Attorney, and I distinguish that from District Attorney, but the assistants who really do the work and I think that that gives you a really good background for this office.

I note that you had been a deputy sheriff and the police legal coordinator for approximately 90 law enforcement agencies in Chester County, Pennsylvania. That is a suburban county——

The **Chairman**. Of Delaware.

Senator **Specter**. That is a suburban county of Delaware County, Pennsylvania, right next to Delaware County—[laughter]—and I think provides, for just a second I considered some responses, but that would be never-ending. Really, it is a great background. It is a county which has both urban and suburban aspects and gives really very good training.

I note from your resume, you have had extensive experience with juvenile cases, the Rape Crisis Intervention Program, the Victim/Witness Procedures Programs, that you have taught as an adjunct faculty member at West Chester University, and you had served in the Peace Corps in Colombia, South America, and was a director for the Office of Program Development of the Peace Corps. That is really an extraordinary background to come to this position.

I share in what Senator Biden has said today about the importance of really vigorous and effective administration of these programs and it is not easy with an Administration which has a foot and a half with the Office of Management and Budget and is looking to zero out programs, to eliminate their funding. That makes it very, very tough. We have fought a long and consistent battle here for the Office of Juvenile Justice and Delinquency Prevention where the Administration has sought to eliminate it every year and I am going to be joining with Senator Biden as co-sponsor of his Criminal and Juvenile Justice Partnership Act which he is introducing today because we share the same deep commitment about a very important federal role in these programs.

There is a massive drug program which is not being administered properly, in my judgment today, and you are going to have a significant role in that. Last year, with much bally-hoo, the Congress acted to foot $1.7 billion into the fight against drugs, $671 million for state and local government, $24 million for Pennsylvania, and so far, there has been hardly a trickle, and at a time when we ought to have the benefit of a year's experience in knowing what to do, that program has not moved forward. And I think it is going to take some tough work from you, Mr. Abell and from others, to insist that these programs be administered. And my own sense is that there is really an interest by others in the Administration and the Department of Justice to do it, but a reluctance to spend the money but if you are tough enough, it can be done. And one of the things I want to emphasize to you is the need to be really persistent.

When Congress authorizes the programs and the President has signed them, that is your authorization to proceed to work, not only from the Congressional mandate, but from the Executive imprimatur as well. And you have an outstanding background and you can really do the job, but you are going to have to be tough and resolute and we will be watching.

Frankly, we cannot watch too closely. We have to rely upon you to carry it out but I am delighted to see a former resident of Pennsylvania take on this job, born in Philadelphia, really good credentials, and I think you are well-qualified to do the kind of a job which ought to be done but you are going to have to be steadfast and resolute in doing it. Thank you very much, Mr. Chairman.

STATEMENT OF RICHARD ABELL, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF JUSTICE ASSISTANCE, DEPARTMENT OF JUSTICE

The CHAIRMAN. I am going to ask you some questions, if I can, Mr. Abell and again we have been hardened a little bit on this side of the bench over the last seven years. It has been a continuous battle to support the program that you are about to administer. I am not being pejorative when I ask you some of these questions. As a consequence of the history that goes before you, it brings me to these questions.

Mr. ABELL. I understand.

The CHAIRMAN. I noticed that much of your experience before joining the Administration, and the Senator did not mention Delaware Law School; that much of the experience before joining the Administration was in the area of the country with which I am very familiar.

Can you tell me a little bit about your previous work experience?

Mr. ABELL. Other than serving as an Assistant District Attorney?

The CHAIRMAN. Yes.

Mr. ABELL. Yes, sir. Before I assumed this position, there was the position of Deputy Assistant Attorney General since 1983 in the Department of Justice. I served for 2 years before that in an administrative position in the Peace Corps, prior to which I served on the staff of then Senator Schweiker of Pennsylvania.

The CHAIRMAN. In what capacity did you serve?

Mr. ABELL. That was constituency services in central Pennsylvania. I worked out of Harrisburg from, I guess, August 1979 through December 1980 when the Senator left office. Prior to working for Senator Schweiker, I had been an Assistant District Attorney for 5 years, and also taught law school on the adjunct faculties of the two schools mentioned. Before I served as an Assistant District Attorney, I had served in the military for 2 years in the Republic of South Viet Nam and, prior to that, I had served in the Peace Corps in South America.

The CHAIRMAN. Why do you want this job?

Mr. ABELL. I enjoy it. I enjoy the topics. I enjoy the span, the scope, the research, the statistics, the victims issues. I enjoy juvenile justice. I served for one year as an Assistant District Attorney working with juvenile justice issues. I enjoy the entire span and scope, sir.

The CHAIRMAN. I would appreciate your being candid with me, if you will. When this opportunity availed itself, knowing that the Administration has attempted to zero out this program, what went through your mind. You know, it is kind of a mixed blessing; you say it is a great honor for the President to nominate you for what I hope you consider an important post, but also to know that the Administration has tried to eliminate the post.

Mr. ABELL. Yes, sir. My understanding of the Administration's position is that it is based upon deficit reduction issues rather than programmatic issues.

The CHAIRMAN. Again, and I am not being facetious when I ask this. Is that truly what you believe their position to be?

Mr. ABELL. Yes, sir. And I enjoy the programs.

The CHAIRMAN. The view that many of us share here is that, in light of the earnest with which they proceeded to move against this program and as early as they did, that it has as much to do with objection to the programs as it does to do with deficit reduction and the amount of money we are talking about reducing the deficit here, if they eliminated this program, and I do not expect you to comment on this, but as compared to a trillion dollar increase in the debt that has occurred over this period of time, is not much. The sacrifice you would make by eliminating the program, the benefit that would accrue to the deficit reduction, would be minuscule.

Let me be direct with you. I voted against the previous nominee to administer the Office of Juvenile Justice and Delinquency Prevention because I believed he was there to dismantle the program and I, quite frankly, believed his tenure demonstrated that purpose.

On the other hand, I had no objection to your predecessor, Lois Herrington, who, although a dedicated member of the Administration, clearly believed in the benefits of the programs she was responsible for and, not only fought to have them continued, but encouraged the development of innovative proposals.

My question is, where do you stand? Are you going to merely go in and administer the program? Are you going to pursue and push the program? Are you going to attempt to be innovative? Do you view your role as a caretaker? How do you view your role?

Mr. ABELL. I view the priorities, sir, as first on drug abuse. Secondly, on the victims issues and the continuation of what Mrs. Herrington started. And thirdly, on crime prevention. I see that the entire Office of Justice Programs necessitates management and supervision but it also necessitates more than that, sir, and that is a spark or an enthusiasm, whatever one might wish to call that.

The CHAIRMAN. Are you going to take an aggressive position in arguing the need for these state and local assistance programs within the Administration? Are you prepared to do battle? Have you donned your armor? You know, you have got some windmills out there but somebody has to tilt at them.

Mr. ABELL. Yes, sir, I understand that. Let me state that I know that some of these issues are constantly under deliberation in the Administration and I am certainly prepared to play my role within that process.

The CHAIRMAN. What role?

Mr. ABELL. Of one of continuing the dialogue of discussing the programs, their values, and well, I think that says it in short, sir.

The CHAIRMAN. Looking at the program over the next two years, what would you like to achieve?

Mr. ABELL. I think, as I indicated, that first of all, I would like to put the strongest emphasis on the drug abuse problems that are hitting this country. Secondarily, to the victims issue that Mrs. Herrington had started. I do not wish that to, in any way, be lessened, I wish to continue that and with a high degree of visibility. And thirdly, with crime prevention and do much more with that.

The CHAIRMAN. Tell me about how you are going to deal with drugs as a priority. What are you going to do?

Mr. ABELL. Yes, sir. Well, we currently do a fair amount of research and collection of statistics on drug issues. In fact, within the last two years, the Office of Justice Programs has oriented itself to doing much more in that direction—certainly with the current funding for the Bureau of Justice Assistance, including both the formula grants that go out to the States and the discretionary grant programs.

The CHAIRMAN. When the Attorney General was here before us—we have a long and close relationship, you know—Senator Specter raised the question about the fact that some of the states had not applied, or known how to apply, under the drug bill that I was the author of last year, that $1.7 billion drug bill that the Administration enthusiastically supported and then defunded the next year.

The Attorney General, and I am paraphrasing, indicated that it was not the job of the federal government to go out there and encourage states to participate in these programs. Do you view your role as Administrator to encourage the states, whether it is Pennsylvania or any other state? Are you going to send your people in the field and say, look it is an important program. Here is what it is, here is how you can qualify for it. Are you going to be aggressive?

Mr. ABELL. Senator, I believe we already are. I cannot speak for HHS and for Education in their programs of drug abuse, but I can say that 52 State units, as of this morning, had put in for their 10 percent administrative funds. One or two other states have elected not to participate in the administrative portion. All States and state units have indicated they intend to participate in the funding.

We already have received state-wide drug strategy plans from four States, that follows generally after the administrative funds. So I see that everything is moving very rapidly and on target.

The CHAIRMAN. As I said earlier, I intend to introduce today the Criminal and Juvenile Justice Partnership Act of 1987 and this legislation will reauthorize the five agencies that you will oversee if you are confirmed. I would like to ask you. Do you support the reauthorization of the following programs and at what funding levels: the State and Local Narcotics Control Assistant grants. Do you support the funding of that program?

Mr. ABELL. Senator, as a spokesman here today for the Administration, I have to state that I know that these programs are under deliberation. I know that the Attorney General has stated on several occasions that he is seeking a reasonable accommodation, certainly in the Juvenile Justice program and perhaps on others. Therefore, I must indicate that, while these issues are still under deliberation in the Administration between the Attorney General and other elements of the Administration, that it would be in-apropos for me to state any other opinion.

The CHAIRMAN. I am confused then. I do not know of any deliberation. The Attorney General said they wanted this budget to be zero. That is not much of a deliberation. I and others in this Committee, said we wanted the programs to be funded and we put in a dollar level. You come before us and you say your role is that you are going to fight for the programs and yet you will not take a position on whether or not the programs should be funded. How I can vote for you if you will not even take the position of whether or not you should fund the program that you are going to administer?

Mr. ABELL. Sir, if the funds are appropriated and if the reauthorization process completes itself, then I can assure you that the programs will be managed and supervised well and enthusiastically. In terms of the internal discussions and deliberations within the Administration, I must defer rather than forward some other opinion.

The CHAIRMAN. Where is this fighting for the programs going to come in? Next year the budget process is going to come around.

Mr. ABELL. I do not know that, sir.

The CHAIRMAN. But you are the one who is going to have to fight for the program.

Mr. ABELL. Yes, sir.

The CHAIRMAN. Well, are you going to fight for the program?

Mr. ABELL. As I said, I am continually in discussions and deliberation with the Attorney General and others and that process will continue but I do not feel that I am at liberty to disclose deliberations that are internal.

The CHAIRMAN. I am told by staff that when you were before the House Appropriations Subcommittee, you supported the elimination of the drug grants to state and local governments. Is that true?

Mr. ABELL. Sir, as a representative of the Administration, I must represent the entire views of the Administration. Consequently, yes, that was a budgetary issue and that was the viewpoint of the Administration.

The CHAIRMAN. And this is the program you would administer?

Mr. ABELL. Yes, sir.

The CHAIRMAN. You know, I understand the requirement to abide by whatever the judgment the Administration ultimately arrives at, but I have never seen a conflict between an Administration official suggesting, "I will abide by the fact that this or that program will not be funded, but I think it should have been funded or I think it should be funded. I lost that battle and I am a team player and now I am going to do what the Administration wants."

All I am trying to get from you is whether or not you support, you personally, state and local narcotics control assistance? The Office of Juvenile Justice and Delinquency Prevention? The Bureau of Justice Assistance? Do you support those programs?

Mr. ABELL. I support the programs.

The CHAIRMAN. Assuming the Administration is successful in eliminating these programs, what would be your responsibility as Assistant Attorney General?

Mr. ABELL. First of all, three of the programs would not be eliminated: the National Institute of Justice, the Bureau of Justice Statistics, and the Office for Victims of Crime. Those three agencies would continue.

Secondly, with the agencies that would be discontinued—that is, a large part of the Bureau of Justice Assistance and the Office of Juvenile Justice—it would take three to four years for their funding cycles to completely discontinue. Under any and all circumstances, even if they were discontinued today, it would take three to four years for those agencies to terminate.

The CHAIRMAN. I realize you are in a tough position.

Mr. ABELL. Yes, sir.

The CHAIRMAN. I think you are, using you in an editorial sense, are making a mistake that didn't used to be made during the Nixon Administration, the Ford Administration, and the beginning of the Carter Administration, but it has become very much in vogue here.

I think many of you confuse, if you do not mind me saying so, your requirement of loyalty to the Administration and your ability to have and be able to express, independent judgments. They are not inconsistent. One can have an independent judgment, state it to this Congress, let us know what you would or would not do, what you will or will not advocate, and all of us understand full well that if you lose the battle—since you work at the pleasure of the President you will abide by the outcome and support vigorously the President's ultimate position.

But the caution about whether or not you would be willing to tell us that you are for or against the existence of the program and have made the case for or against without revealing any inside information about what the Attorney General or anyone else said to you, is something that perplexes me. Let's do it another way. Maybe this will help.

Were you a United States Senator, would you be introducing and pushing for the continuation and the funding of these programs?

Mr. ABELL. Well, that is highly speculative, Senator, if I were to be a Senator in your shoes or in Senator Specter's or anyone else's. Permit me to state that absent the internal deliberations that are taking place in the Administration, fundamentally, there is very little criticism of the programs programmatically. I do not think there is any issue on that.

The CHAIRMAN. I think you should be at the State Department instead of the Justice Department. Well, all right, my colleagues may have some questions for you that will be submitted to you in writing. Let me check for a moment here. Quite frankly, I am trying to figure out whether it is worth even asking you these questions. I suspect you are not going to answer them. We will give it a shot anyway.

When the Congress reorganized the Office of Juvenile Justice programs in the 1984 crime bill, I was very concerned that there be independence between the research and statistic agencies and the grant and funding agencies. And this was to ensure some objectivity in the Department's ability to collect data and evaluate the progress of the grants being funded. As Assistant Attorney General for the Office of Justice Programs, how will you view your leadership with respect to the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention?

Mr. ABELL. As a coordination role, sir. They have independent statutory authority for the grants and the contracts. They are part of a larger agency, the Office of Justice Programs, and administrative and general authority issues, budgets, personnel, et cetera. But I would see my role as one of coordination.

The CHAIRMAN. By law, the Administration is required to submit proposals to reauthorize programs a year before the end of such programs. For example, most of the programs under the Office of Justice Programs expire at the end of fiscal year 1988.

Now, by law, the request to reauthorize these programs should have been forwarded to the Congress by May 16. As of today, Congress has not received any such request. Does the Administration intend to submit requests to reauthorize these programs?

Mr. ABELL. Sir, I do not have a final response for you on that. I know that that is under deliberation, it is under deliberation at levels above myself, so I do not have a response. I do not know.

The CHAIRMAN. Did you not ask before you came up here knowing you would be asked that question. I mean, you could not have wondered whether or not we would ask you that question.

Mr. ABELL. Certainly we have participated in deliberations within the Department of Justice, and it is now at a level above us.

The CHAIRMAN. What role did you play in drafting the Administration's position?

Mr. ABELL. Well, I do not know if the final draft has been prepared. I know that there certainly have been options, and numerous options that have been discussed, and, at this moment, they would probably be in the Office of Legislative Affairs.

The CHAIRMAN. Well, I have half a dozen additional questions that I will submit to you in writing. My colleagues may have some questions. The more rapidly you can answer the questions, the more quickly we can make judgments about what to do about your nomination.

Mr. ABELL. Yes, sir.

The CHAIRMAN. Thank you and welcome to your family and you are excused.

Mr. ABELL. Thank you for the honor of being here, sir.

STATEMENT OF VERNE L. SPEIRS, ACTING ADMINISTRATOR, OFFICE OF JUVENILE JUSTICE AND DELINQUECY PREVENTION, OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE

The CHAIRMAN. And now, our next witness is Verne L. Speirs. Would you come forward, Mr. Speirs? You were named acting Administrator of the Office of Juvenile Justice and Delinquency Prevention on June 9, 1986 and you also continue as Administrator of the Office for Victims of Crime and the Department's Office of Justice Programs. Is that correct?

Mr. SPEIRS. That is correct, sir.

The CHAIRMAN. Is there any family here today?

Mr. SPEIRS. Yes, there is, Senator.

The CHAIRMAN. Would you introduce your family?

Mr. SPEIRS. Allow me to introduce my wife, Gayle Speirs.

The CHAIRMAN. Honored.

Mr. SPEIRS. Andrea.

The CHAIRMAN. Welcome, Andrea.

Mr. SPEIRS. And my son, Verne.

The CHAIRMAN. Verne, how are you?

Well, I guess that you have already figured out that what I am concerned about and in reviewing your background, I am encouraged to see that you have been a probation officer and have administrative experience working with the Victims of Crime office. Do you have any direct experience working with young people?

Mr. SPEIRS. Yes, sir. For approximately nine years, I was actively involved in direct services to juveniles, starting with investigation of dependent neglected minors, working directly with investigation in the juvenile court, supervision, foster home placement, institutional placements, and then working in programs that dealt with very sophisticated delinquents.

The CHAIRMAN. What other background do you have that qualifies you to be the Administrator of the Office of Juvenile Justice and Delinquency Prevention?

Mr. SPEIRS. I think that there are two other qualifications that I would point out. Number one, I believe in dealing with prior LEAA programs, dealing with monies going into the States, and dealing with monies that were used for crime and juvenile justice programs provide a strong juvenile justice background, and also I believe I have very strong administrative skills.

The CHAIRMAN. Did you know all the budget proposals submitted by this Administration have attempted to eliminate juvenile justice programs? Congress has blocked these actions every year. Do you support the President's budget proposal for fiscal year 1988 which targets the Office of Juvenile Justice for elimination?

Mr. SPEIRS. Senator, I would have to say, as a Presidential nominee, I have to support the President's budget.

The CHAIRMAN. Well, why do you want the job if you want to eliminate the program?

Mr. SPEIRS. Well, I think there are two things that we have to look at. Number one is the past history of what has taken place and there has been an Office and there has been a program, and I think that with looking at some of the successes in that Office, and looking at some of the on-going programs that are successes, I think it has value. With my experience in the field, I believe that there are some changes or some impact that can be made with the Office receiving funding and with the programs that we can put in place.

The CHAIRMAN. Is that another way of saying that you know we are going to fund it anyway?

Mr. SPEIRS. Well, I would have to go from a historical perspective. I certainly would not try to second-guess Congress or make a future guess, I would just look from a historical perspective.

The CHAIRMAN. You guys are something else. I think you all go to the same school.

Mr. SPEIRS. No, sir, we do not.

The CHAIRMAN. Whatever happened to somebody just saying, this is what I believe? I truly do not understand, I truly do not understand your value system. I do not understand why you just cannot say, I believe in this. Do you believe in this program?

Mr. SPEIRS. Senator, I certainly do. Let me tell you. I think there are programs that have succeeded. I think there are programs that have merit. I think that we have been diligent in bringing attention to positive programs. We make those programs known and those programs have been reviewed by the field and there are some very successful programs and I think they make a difference. One, for example, is in the serious crime area. I think the decision that has to be made as far as funding, is a decision that is made based upon priorities, but it doesn't mean that you cannot say, look, there are successes, there are programs that do make an impact. There are programs that do affect neglected minors. There are programs that do save victims from further suffering. I have no problem with saying that there are successes.

The CHAIRMAN. You almost say it like it is hard to admit. Isn't that something you say. There are successes. Let me ask you. What current or former initiatives of the Office of Juvenile Justice would you seek to expand and continue and what new initiatives would you undertake if confirmed?

Mr. SPEIRS. I believe if I were to look at programs that I would expand, I think there is great merit in the program dealing with serious crime and dealing with the serious offenders. I think also that the program that deals with the advocacy for children, the CASA Program, has great merit. I also believe that the Permanency Planning Program has great merit. I think those are three very vital programs. On the other side, as far as priority areas that I think the Office should look at, if there is continuation of the Office and there are funds, I think the number one priority would be looking at the drug issue. We have not been included in any of the drug funding but we have done some work in directing our money that way. I think there are areas that we can look at in dealing with collecting and having a better handle on information in statistical data concerning what is taking place in the juvenile justice system across the United States.

The CHAIRMAN. For the past 6 years, the administration of the Office of Juvenile Justice and Delinquency Prevention has failed to require each federal agency that administers the federal juvenile delinquency program to submit a Juvenile Delinquency Development Statement as provided by the law.

Would you give us your personal commitment that, if confirmed, you will take the necessary steps to require that federal agencies administering such programs, to develop and submit statements as required by the law assuming that the Department, your agency, is re-authorized?

Mr. SPEIRS. I would certainly tell you that I would do that, Senator.

The CHAIRMAN. So we have your personal commitment you will do that?

Mr. SPEIRS. I have no problem doing that, yes.

The CHAIRMAN. For the past 6 years, the Office of Juvenile Justice has published its annual program plan so late in the fiscal year that Congress has not had a chance to take its conclusions into consideration for the next fiscal year. Will you give us your personal commitment that if confirmed, you will publish your program plans for fiscal year 1988 by August 31st of 1987, which is required?

Mr. SPEIRS. I will certainly do everything in my power to meet that deadline. I would like to point out that I believe this year, we maybe did not meet the August—well, I need to check my dates—but we had a program plan out and tried to have it on the streets by March, and I think we will have our program plan out well before August of this year.

The CHAIRMAN. You will come and tell us if you don't, why you are not ready in August?

Mr. SPEIRS. Yes, I will.

The CHAIRMAN. What is, if anything, being done to look at the problem of teen suicide as part of your program plan?

Mr. SPEIRS. Senator, we have discussed it. It is an insidious problem and it is a very serious problem and recently, there has been a lot of attention to it in the press. In looking at the statute and discussing it within the Office and even with General Counsel, it appears that the Office of HHS, their programs really are directed more to the issue of teen suicide than our statute. We have not made any plans and we have not put any resources toward that problem, thinking it is more of a mental health problem. The counseling, the follow-ups, the hotline, suicide hotlines are all incorporated within, I think, the National Institute of Mental Health.

The CHAIRMAN. In accordance with the Juvenile Justice Runaway Youth and Missing Children Act Amendments of 1984, the Attorney General is to appoint a deputy administrator to supervise and direct the National Institute for Juvenile Justice and Delinquency Prevention. Are you aware of that?

Mr. SPEIRS. Yes, I am aware of that.

The CHAIRMAN. Has the Attorney General made a decision on who the next deputy administrator will be, to the best of your knowledge?

Mr. SPEIRS. No, sir, he has not.

The CHAIRMAN. Have you had any input into the selection process?

Mr. SPEIRS. The selection process has not been active. I certainly have thoughts and I certainly have ideas on who should fill that deputy's role.

The CHAIRMAN. Who do you think should fill the role?

Mr. SPEIRS. I have identified a young lady who has a background that I think can fit that role and be a good deputy.

The CHAIRMAN. Since assuming the role of Acting Administrator, what specific changes in management and staffing have you proposed?

Mr. SPEIRS. I think on the management side, Senator, I would like to point out the organized, and I think, the very successful planning process in looking at obtaining input from two tracks, one from inside the Office and one from outside the Office, to do our program planning in a formalized process. We put together input from the field, input from professionals, input from people who are concerned about the Office, and formed our program plan on that basis. I think on a personnel side, I think really the issue has been getting to look at the communication with the staff, looking at the equity of the workload, and looking at how we can really be more productive in working together as a unit or as an Office.

The CHAIRMAN. In the Missing Children's Assistance Act, the Administration was authorized and directed to conduct national incidence studies to determine the actual number of children missing, the number of children who are victims of abduction by strangers, the number of children who are victims of parental kidnapping, and the number of children who are recovered each year.

Now, it has been more than two and a half years since the President signed this enactment into law. Has the first of these periodic incidence studies been conducted and, if so, what does it reveal?

Mr. SPEIRS. Senator, as you know, it is a horrendous issue because of the unverifiability of the numbers and the confusion over the numbers. And what we have done, we have basically funded the study and we are in the last processes for awarding the funds. But what we did initially was fund two pilot studies. The difficulty is in trying to measure or count people who are not where they are supposed to be, so we had to be very careful in designing the study and making sure that we had a valid approach. We brought in some very, I think, good experts to give us guidance on it. The two pilot studies are done, we have completed the main part of the pilot research and I believe that by the mid-summer, late-summer, we should be able to give you or other oversight committees, a direction and some feel for what the numbers are.

The CHAIRMAN. Have those pilot studies been made available to the Congress?

Mr. SPEIRS. I do not know. I do not believe so. I could be wrong.

The CHAIRMAN. Is that possible? Could they be made available to us?

Mr. SPEIRS. Certainly, that is possible.

The CHAIRMAN. Within participating jurisdictions, how many status offenders and non-offenders were held in secured detention facilities or secured correctional facilities last year, do you know?

Mr. SPEIRS. Senator, I just have to answer on the record that I will come back to you on that one. I do not know.

The CHAIRMAN. I would like you to answer that and also how about for non-participating jurisdictions. And I would like to know on what evidence you all base your judgments of the estimates.

Mr. SPEIRS. Certainly.

The CHAIRMAN. Well, again, I wish you all would not be so tentative. The President has a responsibility to uphold and enforce the law. That is why there are confirmation hearings. I would respectfully suggest that there is nothing wrong with being an advocate and still be able to be loyal to an Administration.

The President's first role, as well as mine and yours and everyone else's, is to uphold the law. We have made it clear that we think these programs are important, we have funded them every year over his objection which is his right to do, but once lost, he has, in my view, effectively not pursued the law by allowing things to just stagnate because there have not been people in there who have been willing to say all right, this is the law and now I am going to move. But I hope that if you are confirmed, both of you lose some of your timidity and you have the courage to do what I hope you believe.

Thank you very much. I appreciate it. We will submit these questions and other questions in writing to you and as I have said, Senator Thurman and Senator Dole both have questions and there are statements in support of your candidacies by Mr. Robbie Callaway of the Boys Club of America and Mr. Richard Arcara of the National District Attorneys Association, both fine organizations and their statements are welcome in support of your background and your record, Mr. Speirs, and they will be entered in the record.

Unless you have a concluding statement, I will adjourn these hearings and wish you well. In your colleague's home state of Pennsylvania, they have a slogan. They say you have a friend in

Pennsylvania. You have advocates up here. Take advantage of us, show a little gumption. Take some of these guys on, some of these programs. These kids need help badly and these programs are important so fight a little bit for them.

Thank you. The hearing is adjourned.

[Whereupon, at 11:10 a.m., the committee adjourned subject to the call of the Chair.]

RECEIVED MAR 13 1987

Biographical Information for
Richard Bender Abell

1) Full name (include any former names used).

Richard Bender Abell (Richard Lon Welch, first five years before adoption).

2) Address: List current place of residence and office address(es).

Department of Justice, Office of Justice Programs
633 Indiana Avenue, N.W. Room 1300
Washington, D.C. 20531

3) Date and place of birth.

2 December 1943 - Philadelphia, Pennsylvania.

4) Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address (es).

Married. Lucia del Carmen Lombana-Cadavid. Housewife.

5) Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

The George Washington University, 1961-1966, B.A., International Affairs. 1966.

The George Washington University Law School, 1971-1974. J.D. 1974.

6) Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1986-Present, Acting Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice

1983-1986, Deputy Assistant Attorney General, Office of Justice Programs, Department of Justice.

1982-1983, Director, Office of Program Development, Peace Corps

1981-1982, Director, Office of Programming and Training, Peace Corps

1979-1980, Field Representative/Central Pennsylvania for U.S. Senator Richard Schweiker

1975, Adjunct Faculty, West Chester State College Center for Criminal Justice, West Chester, Penna.

1975-1977, Adjunct Faculty, Delaware Law School, Wilmington, Delaware

1974-1979, Assistant District Attorney/Police Legal Coordinator, Chester County, West Chester, Penna.

1977-1979, Deputy Sheriff, Chester County, West Chester, Penna.

1974-1980, Associate, Law Offices of Reilly & Fogwell, West Chester, Penna.

1967-1969, Peace Corps Volunteer, Rural Community Development, Colombia, South America.

7) Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

United States Army Infantry, 1969-1971. Service in the Republic of South Viet Nam, First Air Cavalry Division (Airmobile), , "A" Company, 2nd Bn, 7th Cavalry, 188-34-8115 Awarded: Air Medal, Army Commendation Medal for Heroism, Purple Heart, and the Combat Infantryman's Badge. Retired for wounds received in action.

8) Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

The George Washington University: Order of Scarlet (Honorary); Delta Phi Epsilon (Honorary)

9) Bar Associations: List all bar associations, any legal or judicial-related committees or conferences, of which your are or have been a member, and give the titles and dates you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Chester County Bar Association, 1974-1980

Pennsylvania Bar Association, 1974-Present
National District Attorney's Association, 1974-1979

10) Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong which you feel should be considered in connection with your nomination.

1985-Present, Member of Board of Directors of Federal Prison Industries, Presidential Appointment.

Chairman, National Crime Prevention Coalition by virtue of position as Acting Assistant Attorney General.

American Legion, member.

Veteran's of Foreign Wars, life member.

Disabled American Veterans, life member.

Military Order of the Purple Heart, life member.

First Cavalry Association, life member.

Fraternal Order of Police, Solicitor for local lodge, Chester County, Penna., 1977-1979.

National Trust for Historical Preservation.

National Rifle Association, life member.

The Historical Society of Pennsylvania.

Society of the War of 1812, life member.

Military Order of the Loyal Legion, life member.

Sons of Union Veterans of the Civil War, life member.

Sons of the Revolution, life member.

Sons of the American Revolution, member.

Society of the Colonial Wars in the District of Colombia, member.

Society of the Colonial Wars in Pennsylvania, member.

Military Order of Foreign Wars, life member.

Sons of Confederate Veterans, life member.

Order of the Stars and Bars, life member.

Military and Hospitaler Order of St. Lazarus of Jerusalem, member and Representative of the Washington Metropolitan Area. (Religious and charitable group whose primary fundraising interest is leprosy research.)

Boy Scouts of America, Troop Advisor, 1982-Present.

Parish of St. Lukes, member.

Episcopal Church of the United States.

11) Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

1975, Practice, Eastern District of U.S. District Court, Philadelphia, Penna.

1974-Present, Chester County Court of Common Pleas, West Chester, Penna.

1974-Present, Supreme Court of Pennsylvania.

12) Published Writings: List the titles, publishers, and dates of books articles, reports, or other published materials you have written. You may also list any significant speeches you feel may be of interest to the Committee.

Co-authored chapter, "Prison Labor: A Neglected Resource", Crime and Punishment in Modern America, The Institute for Government and Politics, 1986.

"Ex-Socialist is now a Reaganite: Conservatism Embraced to Make America Great Again." "Conservative Digest", November, 1980, vol. 6, November 11, pg. 32.

"Post Manufacturing Duties to Develop and Supply Curative Safety Devices", pg. 133, vol. 5, Proceedings, Products Liability Prevention Conference, IEEE 74CH0911-8R (1974).

"The Manufacturer's Duty to Test and Inspect", pg. 231, vol. 4, Proceedings, Products Liability Prevention Conference, IEEE CH0814-4 PLP (1973).

13) Health: What is the present state of your health? When was your last physical examination?

Good. Complete physical examination Fall/Winter 1982.

14) Public Office: State (chronologically) any public offices other than judicial offices you have held, including terms of service and whether such positions were elected or

appointed. State (chronologically) any unsuccessful candidates for elective public office.

1985-Present, Member of Board of Directors of Federal Prison Industries, Inc., Presidential Appointment.

1986-Present, Ex-officio Member of the National Institute of Correction's Advisory Board by virtue of position as the Acting Assistant Attorney General.

1986-Present, member of the Federal Coordinating Council on Juvenile Justice and Delinquency Prevention by virtue of my position as the Acting Assistant Attorney General.

1979, Candidate in Republican Primary for the Clerk of Courts, Chester County, Penna.

15) Business or other occupation:

a. Have you ever been engaged in any business or profession other than the practice of law or holding of judicial or other public office?

b. Are you now an officer, director, or otherwise engaged in the management of any business enterprise? If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

a. Yes. 1982-1983, Director, Office of Program Development, Peace Corps.

1981-1982, Director, Office of Programming and Training, Peace Corps.

1979-1980, Field Representative\Central Penna. for U.S. Senator Richard Schweiker.

1975-1977, Adjunct Faculty, West Chester State College, Center for Criminal Justice, West Chester, Penna.

1975-1977, Adjunct Faculty, Delaware Law School, Wilmington, Delaware.

1967-1969, Peace Corps Volunteer, Rural Community Development, Colombia, South America.

b. I am not engaged in the management of any business enterprise.

16) Please complete the attached financial net worth statement in detail. (Add schedules as called for.) See Attached.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	3	000	00
U.S. Government securities—add schedule	2	000	00
Listed securities—add schedule			00
Unlisted securities—add schedule		300	00
Accounts and notes receivable:			
Due from relatives and friends		0	
Due from others		0	
Doubtful		0	
Real estate owned—add schedule	160	000	00
Real estate mortgages receivable		0	
Autos and other personal property	90	000	00
Cash value—life insurance		0	
Other assets—itemize:		0	
Total assets	245	300	00
CONTINGENT LIABILITIES			
As endorser, comaker or guarantor		0	
On leases or contracts		0	
Legal Claims		0	
Provision for Federal Income Tax		0	
Other special debt		0	

LIABILITIES			
Notes payable to banks—secured		0	
Notes payable to banks—unsecured		0	
Notes payable to relatives		0	
Notes payable to others		0	
Accounts and bills due	15	000	00
Unpaid income tax		0	
Other unpaid tax and interest		0	
Real estate mortgages payable—add schedule	123	000	00
Chattel mortgages and other liens payable		0	
Other debts—itemize:		0	
Total liabilities	138	000	00
Net worth	107	300	00
Total liabilities and net worth	245	300	00
GENERAL INFORMATION	No	0	
Are any assets pledged? (Add schedule.)	No	0	
Are you defendant in any suits or legal actions?	No	0	
Have you ever taken bankruptcy?			

Net Worth Schedule for Richard Abell

U.S. Government Securities

20 U.S. Savings Bonds @ $100.00

Unlisted Securities

200 shares - Prairie Energy Minerals

300 shares - Innovative Technology, Inc.

500 shares - October Oil Company

(of negligible value @ $300.00)

Real Estate Owned

8209 Chancery Court
Alexandria, Virginia 22308

Real Estate Mortgages Payable

1) **Washington Federal Mortgage Company**
Herndon, Virginia
$109,000.00

2) Sovran Equity Mortgage Company
Richmond, Virginia
$14,000.00

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used).**
Verne Logan Speirs

2. **Address: List current place of residence and office address(es).**

Vienna, VA 22180

Office of Juvenile Justice and Delinquency Prevention
633 Indiana Avenue, N.W., Suite 1142
Washington, D.C. 20531

Office for Victims of Crime
633 Indiana Avenue, N.W., Suite 1342
Washington, D.C. 20531

3. **Date and place of birth.**
June 10, 1942
Klamath Falls, Oregon

4. **Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).**
Married: Gayle Elizabeth Weller Speirs
Housewife

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**
Southern Oregon State College, Ashland, Oregon
Attended from September 1960 to June 1964

California State University, San Jose, California
Attended from September 1964 to August 1966
Bachelor of Arts Degree, August 1966

McGeorge School of Law, Sacramento, California
Attended 1969

California State University, Sacramento, California
Attended from September 1970 to June 1972
Master of Science Degree, June 1972

University of California, Davis, California
Various extension training classes taken during 1975 and 1976

6. **Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit and otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

June, 1986 - Present: Acting Administrator, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, Department of Justice, Washington, D.C.

September, 1985 - Present: Administrator, Office for Victims of Crime, Office of Justice Programs, Department of Justice, Washington, D.C.

> NOTE: I have remained in the position of Administrator, Office for Victims of Crime while acting as the Administrator for the Office of Juvenile Justice and Delinquency Prevention.

March, 1982 - August, 1985: Executive Assistant to the Chairman, U.S. Merit Systems Protection Board, Washington, D.C.

November, 1980 - February, 1982: California State Board of Corrections, Sacramento, CA

July, 1974 - October, 1980: Senior and Supervising Deputy Probation Officer, Sacramento County Probation Department, Sacramento, CA

July, 1973 - June, 1974: Criminal Justice Planner, California State Office of Criminal Justice Planning, Sacramento, CA

November, 1968 - June, 1973: Deputy and Senior Deputy Probation Officer, Sacramento County Probation Department, Sacramento, CA

August, 1966 - October, 1968: Deputy Probation Officer, Santa Clara County Probation Department, San Jose, CA

PART-TIME EMPLOYMENT:

1981 - 1983: Partner, Video Dynamics, Loomis, CA. (Partnership dissolved in 1983.)

1980 - 1981: Sales, Moss & Moss Realtors, Loomis, CA

1980: Consultant, Criminal Justice Research Foundation, Sacramento, CA

1974 - 1979: Instructor, Los Rios Community College District, Carmichael, CA

1973 - 1979: Instructor, Golden Gate University, Sacramento, CA

1966 - 1968: Sales, Florsheim Shoe Store, Santa Clara, CA

7. **Military Service:** Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   None

9. **Bar Associations:** List all bar associations, any legal or judicial-related committees or conferences, of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   None

10. **Other Memberships:** List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong including civic, educational, and "public interest" law which you feel should be considered in connection with your nomination.

    Izaak Walton League of America
    Arlington-Fairfax Chapter
    1701 N. Fort Meyer Drive
    Suite 1100
    Arlington, VA 22209

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

    None

12. **Published Writings:** List the titles, publishers, and dates of books, articles, reports, or other published materials you have written. You may also list any significant speeches which you feel may be of interest to the Committee.

    A System-Wide Analysis of Juvenile Justice Services in Sacramento County a Resource Report, 1979

    County Justice System Subvention Program Plan, Sacramento County, 1979-1980

    County Justice System Subvention Program Plan, Sacramento County, 1978-1979

13. **Health:** What is the present state of your health? When was your last physical examination?

    Excellent - Last physical examination: 1985

14. **Public Office: State (chronologically) any public offices other than judicial offices you have held, including terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

I served on the Placer County California Republican Central Committee from 1977 through 1982. As a regular member of the committee, it was necessary to file as a candidate and be elected to a regular membership seat. I served as Chairman of the Central Committee during 1981 and early 1982.

I have had no unsuccessful candidacies for elective public office.

15. **Business or other occupation:**

a. **Have you ever been engaged in any business or profession other than the practice of law or holding of judicial or other public office? If so, give details, including dates.**

From 1981 through 1983, I was a partner in a firm by the name of Video Dynamics. My involvement as a partner was a part-time activity. This business was formed for the purpose of video taping home furnishings and personal property for insurance coverage and claim purposes. This business was located in Loomis, California, and the partnership was formally dissolved in 1983.

b. **Are you now an officer, director, or otherwise engaged in the management of any business enterprise? If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.**

No

16. **Please complete the attached financial net worth statement in detail. (Add schedules as called for.)**

See attached

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks (checking)	1	500	00
U.S. Government securities—add schedule		-0-	
Listed securities—add schedule		-0-	
Unlisted securities—add schedule		-0-	
Accounts and notes receivable:			
Due from relatives and friends	1	500	00
Due from others	20	000	00**
Doubtful		-0-	
Real estate owned—add schedule	324	000	00
Real estate mortgages receivable		-0-	
Autos and other personal property	24	000	00
Cash value—life insurance		-0-	
Other assets—itemize: Savings	5	000	00
Payne Webber Cash Acct. *	35	000	00
Benham Capt. Mgt. Group *	1	000	00
IRA - State Street Bank *	4	676	00
AVIA Group Int'l (stock)		700	00
Total assets	417	376	00

LIABILITIES			
Notes payable to banks—secured		-0-	
Notes payable to banks—unsecured	5	000	00
Notes payable to relatives		-0-	
Notes payable to others		-0-	
Accounts and bills due		200	00
Unpaid income tax		-0-	
Other unpaid tax and interest		-0-	
Real estate mortgages payable—add schedule	214	300	00
Chattel mortgages and other liens payable		-0-	
Other debts—itemize:			
College Loans for daughter	4	759	00
Total liabilities	224	259	00
Net worth	193	117	00
Total liabilities and net worth	417	376	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor	6	000	00
On leases or contracts		-0-	
Legal Claims		-0-	
Provision for Federal Income Tax		-0-	
Other special debt		-0-	

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No	-	
Are you defendant in any suits or legal actions?	No	-	
Have you ever taken bankruptcy?	No	-	

*These are mutual fund type accounts.

**In November 1985, I loaned $20,000 to TechWell Mining, Incorporated, a West Virginia corporation. This loan is secured by a convertible promissory note. This loan was to provide a portion of the capital necessary for TechWell to open a new coal mine in the area of Morgantown, West Virginia.

REAL ESTATE OWNED

a. **Primary Residence**

1421 Montague Drive — $300,000 (approx. market value)
Vienna, VA 22180

Balance owed on mortgage is: $196,000 (see attached information)

b. **Rental Property*** — $ 48,000 (approx. market value)

399 Vallejo Street
Roseville, CA 95610

Balance owed on mortgage is: $ 36,655 (see attached information)

*I own one-half interest in this property. Therefore, I am reporting one-half of the value of the property as an asset and one-half of the outstanding mortage loan as a liability.

Signed:

Date: 4/1/87

CONFIRMATION HEARING ON CHARLES F. RULE

THURSDAY, MAY 28, 1987

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum, presiding.

Also present: Senators Thurmond and Humphrey.

Staff present: Eddie Correia, chief counsel, Priscilla Budeiri, counsel, Antitrust Subcommittee; Duke Short, chief minority investigator; Ken Starling, antitrust counsel to Senator Thurmond; and Cindy Lebow, counsel.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. I paused for a moment because, before the hearing opens, I have a lifetime friend of mine with me whom I have asked to sit behind me here. His name is Jerome Lawrence.

Jerome Lawrence is the man, who with his partner, wrote "Inherit the Wind," "Auntie Mame," "First Monday in October," and about 30 other plays. He will leave here around 11 o'clock to go over to meet with the Chief Justice to discuss the movie that he has written having to do with the celebration of the 200th year of the Constitution.

He will go over to meet with the Chief Justice in connection with that, and I just wanted to introduce him to you before we start the hearings. Jerome Lawrence. [Applause.]

It is no secret that I believe this Administration's Justice Department has abdicated its responsibility to enforce the antitrust laws.

This administration claims it supports free enterprise. But again and again it has named persons to head the Antitrust Division who believe neither in vigorous antitrust enforcement nor in free market competition.

It was William Baxter who set the pace. He wanted to abolish the FTC's antitrust authority and he called Supreme Court antitrust decisions "ridiculous" and "rubbish."

Then there was J. Paul McGrath. He allowed key mergers to be completed even though they violated the Division's own merger guidelines. He presided over issuance of the Department's controversial vertical guidelines which were so bad Congress passed a resolution disavowing them. His successor, Douglas Ginsburg, faithfully carried on the tradition of nonenforcement of his two predecessors.

Free enterprise and American consumers have suffered enough during this administration. Congress has its own responsibility to find out if the administration's fourth nominee for antitrust chief believes in free enterprise, open and fair competition, and consumer protection.

Let me make the Chairman's position clear. Antitrust enforcement is not some new-founded concept. It is not any liberal kind of approach to government. It is as conservative as conservative could possibly be. It is the foundation, the laws which make the system work. Free competition is the bedrock of the free enterprise system.

When John Sherman, the Senator from Ohio many years ago, offered the Sherman Antitrust Act—a Republican from my State—it was not some new-founded concept of some liberals. It was a Republican concept that was adhered to strongly by Teddy Roosevelt, the trust-buster, and then supported by people such as Gerry Ford, Richard Nixon, Eisenhower, and others. This administration, which claims that it is so much for free enterprise, has turned its back on free competitive forces being able to work in our society.

The lack of law enforcement by this Administration is bad enough. But that is only part of the picture. What is worse, and what the American people ought to know, is that this administration has made a concerted effort to turn its disregard for the antitrust laws into a legacy for our children and our grandchildren.

The Antitrust Division has undertaken an unprecedented campaign to weaken the law for good through amicus briefs to the Supreme Court and proposed legislation to Congress. How can we expect businesses and consumers to have any respect for the antitrust laws when the Nation's highest law enforcement body does not show any respect for them?

I wish I could guarantee American consumers that this travesty will stop. Unfortunately, however, I cannot order the Justice Department to enforce the law. But I can and will continue to oppose legislation that weakens the protection consumers are afforded under the antitrust laws. I know that my support for the effective enforcement of the antitrust laws and opposition to weakening those antitrust laws is supported by many of my colleagues.

The nomination of Charles Rule to be Assistant Attorney General of the Antitrust Division obviously has enormous ramifications for enforcement of the antitrust laws.

Therefore, his nomination hearing is an appropriate time to review antitrust enforcement during this Administration and to get an idea of what kind of law enforcement we can expect if he is confirmed. I look forward to hearing the views of Mr. Rule on a wide variety of antitrust issues.

At this point, I will put into the record without objection by unanimous consent the statement of the ranking minority member, Senator Strom Thurmond and will have that put in immediately after the chairman's own opening statement.

[The statement of Senator Thurmond follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND IN SUPPORT OF THE NOMINATION OF CHARLES F. RULE TO BE U.S. ASSISTANT ATTORNEY GENERAL

Mr. Chairman, it gives me great pleasure this morning to introduce Mr. Rick Rule, a very talented and dedicated attorney whose professional career has been devoted to public service.

Mr. Rule was born in Nashville, Tennessee and graduated from Vanderbilt University and the University of Chicago Law School. Ever since finishing his clerkship for Judge Daniel Friedman on the U.S. Court of Claims, Mr. Rule has worked in the Antitrust Division of the Department of Justice. He has been the Deputy Assistant Attorney General for Policy Planning and Legislation for Assistant Attorney General J. Paul McGrath and the Deputy Assistant Attorney General for Regulatory Affairs for Assistant Attorney General (now Circuit Court Judge) Douglas Ginsburg. In fact, for much of the past year he has served as Acting Assistant Attorney General for the Antitrust Division—the very position for which he is now being considered in his own right.

Mr. Rule has spoken frequently to bar associations and other legal and professional groups on various aspects of antitrust law. His broad experience in this field and particularly in the administration of the Department of Justice's Antitrust Division make him well qualified for the position to which he has been nominated. For the past seven months, he has demonstrated a profound maturity and sense of responsibility in his management of an agency that employs between 530 and 600 people, including almost three hundred lawyers and 45 economists. Those people are distributed among seven field offices, two economics sections, the Foreign Commerce Section, the Appellate Section, the Legal Policy Section, and the Executive Office. In handling this extensive operation, Mr. Rule has administered a budget in excess of $40 million.

He has supervised the filing of 77 criminal indictments and informations and 14 civil complaints and the Antitrust Division's participation in approximately 120 appellate matters. In addition, he has personally argued on behalf of the United States in three appeals: as *amicus curiae* in *Matsusha Electric Industrial Co.* v. *Zenith Radio Corp.* before the Supreme Court, in *United States* v. *John Scher Presents, Inc.* before the Third Circuit, and in *United States* v. *Mobile Materials, Inc.* before the Tenth Circuit. In all three cases, the position argued by the United States prevailed and the rulings of the courts below were reversed.

In short, Mr. Rule is an unusually talented attorney who is well qualified to be Assistant Attorney General for the Antitrust Division.

Senator METZENBAUM. Mr. Rule, first we would be very happy if you want to introduce your family, which I sort of stole from you a little bit. But we are happy to have you do so, and then, if you have a statement, we will be happy to hear from you.

TESTIMONY OF HON. CHARLES F. RULE, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. RULE. Thank you, Senator. I would like to introduce my wife, Ellen, and my son, Justin. I appreciate you confirming him in advance. We will keep that in mind as he grows older.

Also, there are number of people, friends of mine from the Division, who are in the audience. I will not try to introduce them all, but I want to thank them all for being here and for helping me out.

I would like to say, very briefly, that I am very honored—extremely honored—that the President has nominated me for this position and I look forward to working with you and the other members of this committee and Members of Congress in the future in a cooperative spirit as we have in the past.

That is all, really, that I have to say, and I would be happy to answer any of the committee's questions.

Senator METZENBAUM. Thank you very much.

I will say that indeed you have been cooperative in working with us, and if we could only get you to work to the points that we think you ought to be working, it would be better. But we appreciate your responsibilities and your obligations as a part of a team that emanates out of the White House.

Mr. Rule, I think we would like to put you under oath, if you do not mind. We do that regularly in the Committee. Would you be good enough to stand?

Mr. RULE. Yes, sir.

Senator METZENBAUM. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. RULE. I do.

Senator METZENBAUM. Thank you.

Mr. Rule, the administration and the Department of Justice are supposed to represent the public. Yet, when it comes to antitrust legislation, you repeatedly take the side of the monopolists, higher prices, and against free enterprise and competition.

The administration advocated weakening the standard for illegal mergers. You advocated cutting back on damages for small businesses victimized by monopolization schemes. You advocated making it harder for U.S. citizens to sue international price-fixing cartels.

You come down again and again on the side of the antitrust violators and against the victims.

Let me ask you your position on legislation that could help the victims of price fixers get their money back. Under the law today, if a person pays higher prices because of a price-fixing conspiracy, but he or she does not buy directly from the conspirators, he or she cannot sue. And frankly, I think that is unfair, I think it is absurd, I think it is ridiculous.

Last year, I introduced legislation which would allow the State Attorneys General to go to court to seek redress for consumers who were victimized as indirect purchasers. We did it, giving the Attorney General the right to sue, rather than the individuals—although I believe the individuals should have the right to sue—so that we would avoid a multiplicity of litigation. But the fact is, at least the consumers would then have some rights in the courtroom.

Would you support such a bill?

Mr. RULE. Senator, we discussed this and I went back and looked over the Department's position. Let me say this. I feel the same way you do, in the sense that I am concerned about the plight of indirect purchasers and the inability to get compensated for their injury.

On the other hand, having looked at what we have said, and looked at some of the bills, and talked to my people, there still seems to be this issue that we have to grapple with—and we are happy to work with the Committee to try to grapple with it—and that is the question of how you allocate the damages and how you minimize the confusion and the potential litigation costs that may make some attorneys richer but may result in less damages being paid by defendants, and that would reduce the deterrence of the antitrust laws.

Now, I think if those problems could be overcome and the litigation costs would be reduced and the benefits would outweigh its costs, that would be something I think I could personally support. I have not yet seen that bill, but I would certainly be happy to try to work with you and with your staff to see if those intractable problems that we have tried in the past to work on can somehow be overcome. But I do think that that question of how you allocate those damages is very important.

The reason I—and I want to stress this—the reason I think it is important is because in most of those cases you are talking about price fixing, and it is very important that price fixers pay multiple damages—three times damages. And I think it would be a real shame if the effect of any law was to limit the amount of damages that defendants pay, and so for that reason I, really, at this point have to reserve giving my personal support until I can see a bill that takes care of those problems.

Senator METZENBAUM. Well, you mentioned two problems. One was the matter of making attorneys richer. But since we are giving the right to the State Attorneys General to bring the actions, we do not have to worry about that because the State Attorneys General do not get paid other than by the States. If there is to be some provision on that as to whether they are paid by the state or by the defendant, I have no problem in working that out. Any way, what you want is agreeable with me.

With respect to the matter of allocating the damages, we have literally hundreds of cases. One that comes to mind immediately is the Vietnam War Veterans damage cases having to do with Agent Orange, I think it was. And we have cases so often where there are a multiple number of plaintiffs. Frankly, it is simple for us because you are the representative of the Government in the cases, and I make laws, and so all we do is the two of us agree to give the decisionmaking to the court, the third arm of Government, and let the court decide how those funds are to be divided.

Let me ask you this. We cannot resolve the issue here this morning, but I wonder if I could get you to commit yourself to that fact that you would make every possible effort to work with my office and such other offices as have an interest, as well as States Attorneys General or whomsoever who have an interest, to have a bill in place that can be introduced immediately after the August recess, which gives us more than enough time—it gives us right up until right after Labor Day—and I would like to get that kind of a commitment from you.

We cannot get you to commit to the bill because we do not know the bill, but I am asking you to commit that you will make every humanly possible effort to bring about a resolution and see if we can have a piece of legislation by that time.

Mr. RULE. We certainly will work very hard with you in that period to see if we cannot resolve these very difficult problems.

Senator METZENBAUM. Would you say that the Chair has the right to be optimistic?

Mr. RULE. Until the process begins I am not sure, but I can say this, I know we have some very good folks in the Division and I know you have some very good folks on your staff and up here on the committee staff. If it can be done, I am sure that group of folks can do it.

Senator **Metzenbaum**. Well, I hope that we can start on the process immediately so that there will not be a lapse of time, and perhaps we could do it far earlier than that. But I would like to get started on it.

Let me ask you about another proposal which could help average persons get their money back if they are victims of price fixing. Today the State Attorneys General can sue on behalf of consumers if they purchase directly from price fixers, but neither the Justice Department or the FTC is clearly authorized by statute to do so.

Would you support legislation authorizing the Department and the FTC to seek consumer redress for at least those persons who are direct purchasers?

Mr. **Rule**. Senator, that is an idea that also was raised very recently, and it also raises certain problems. Again, when first mentioned it had some appeal, but let me just mention the concerns that we have.

First, we have our differences and have had our differences in the past with the State Attorneys General. I think those differences sometimes overshadow the cooperative nature of the way we work and the respect and admiration that we have for those State Attorneys General, and one area that they do do a good job in is in parens cases.

I would be a little concerned if a bill in some ways took away from what they do a very good job of, and that is bringing those States' parens cases, which they can do by following on to our own prosecutions and use—according to a bill that you helped write—use our convictions as offensive collateral estoppel against the defendants.

The second issue that I would be a little concerned about is what such a change would mean in terms of the difficulties of litigation and the difficulties of trying to administer this. It is clear that that sort of bill would require some additional commitment of resources, it seems to me.

Now, I do not know how much, or anything else, because this is, again, a fairly new idea that I have begun to think about, given what has been mentioned to me. But it seems to me that there are some problems there that have to be thought about and have to be worked with. But again, I would be happy to talk with your staff and work with your staff and see if there is some solution here.

Senator **Metzenbaum**. You mentioned the concern about State Attorneys General and their prerogatives, but let me point out that there are certain issues that involve a national conspiracy where the Attorney General of the United States should be the person in court. I would like to have some assurance that—I guess my point is, I cannot see why you would not support it.

When it comes to the matter of resources, well, that is our responsibility. The Administration tried to take 100 staff slots away from you, and we in Congress have made it clear so far—my guess is we will prevail—that we are not going to sit back and let them take 100 lawyers away from you. We want you to have adequate resources, and if you need another 100 lawyers, or you need 200 lawyers, or you need further funding, we are talking about peanuts as far as money is concerned in balancing the Federal budget.

We will provide you with those resources, but you have to be the moving party. I would hope that we have your assurance that you will do more than give it pedestrian concern, and that you will seriously work with us to see if we cannot fashion a bill to give you the authority that we want to give you and that you are so anxious to decline.

Mr. RULE. Well, we will certainly, again, as I indicated at the opening and indicated in response to the last question, we want to cooperate with you. I pledge here that we will cooperate and see if we can work through the problems and come up with something that we can support.

Senator METZENBAUM. That is fair enough.

Are there any steps that you believe should be taken in order to help victims of price fixing get their money back that the Chair or you have not mentioned as of this moment?

Mr. RULE. Yes, sir, and I think it is an idea that you and I have both expressed support for, and that is providing treble damages for the United States. I suppose I could go back in history and figure out why the United States only gets actual damages, but I think it is a little ridiculous.

I think the United States ought to be able to get treble damages. We, as the committee knows, have undertaken a rather serious and substantial effort to go after price fixing on Government contracts, bid rigging, and we found a lot of it. It seems to me that those people ought to not only have to go to jail and pay substantial funds, but they also ought to be required to pay the United States Government three times damages.

It is a proposal that we have made and it is one that we would certainly like to work with this committee on.

Senator METZENBAUM. I had a bill to that effect last session and am prepared to put in a bill, or include it in part of another piece of legislation this session, and I will say to you publicly that if you can prevail upon some of my colleagues on this side of the aisle to join in cosponsorship, I think I would be prepared to put a separate bill in and try to move it rather rapidly.

As you well know, Senator Thurmond and I have cooperated before in some legislative efforts in the antitrust field, the Antitrust Improvements Act. If you can prevail upon him, perhaps we can put it in and move it forward very rapidly. I can say this, I am sure I can get a hearing in my Committee for that bill.

Mr. RULE. Yes, sir. We will certainly do everything we can to help in that effort.

Senator METZENBAUM. All right.

Gordon, did you want to say anything? Do you have a statement?

Senator HUMPHREY. Do you have further questions?

Senator METZENBAUM. Well, I do have further questions, but I did not know if you had an opening statement.

Senator HUMPHREY. No, I do not.

Senator METZENBAUM. I have some, Gordon, and then I will throw it to you.

In March, I asked the Antitrust Division how many times the politically appointed chiefs overruled the recommendation of career staff attorneys to oppose a merger. The Division identified 10 such occasions during this administration.

In other words, if the Division had followed its own staff's advice, there would have been 38 percent more challenges to mergers under the Hart-Scott-Rodino pre-merger notification system. I must say, frankly, that I am shocked that the administration sided with corporate counsel over its own staff in these cases, all of which presented clear violations, not according to the Chair, but according to your own staff under the Department's own guidelines.

Now, we do not have time to examine each of these 10 cases, but I would at this point put the entire list of those cases into the record, and it shall be included in the record.

[The information follows:]

H-S-R Cases Meeting The Metzenbaum Criteria */

1.	7/81	HCA/INA
2.	12/81	Giant Ind./Shell Oil
3.	6/82	U.S. Phillips/Westinghouse Electric
4.	7/83	Int'l Paper/Steicher-Traung-Schmidt
5.	10/83	Unimin/Martin Marietta
6.	4/84	MFC, Inc./Community Cablevision
7.	8/84	Williams Cos./Mobil
8.	1/85	Minebea Co./New Hampshire Ball Bearing
9.	8/85	USG/Conwed
10.	12/85	Automated Data Processing/Bunker Ramo

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*/ These are case recommendations resulting from H-S-R filings where:

(1) The Chief of the Section conducting the investigation ultimately recommended filing suit and the case recommendation was ultimately turned down or

(2) the Chief of the Section initially recommended filing suit, a decision was not reached within the H-S-R period and the merger was allowed to go forward. (In both instances after further investigation the Chief recommended against suit.)

Senator **Metzenbaum**. Let's take a closer look at two of them.

First, let's look at the merger of the Minebea Company with the New Hampshire Ball Bearings Company; two companies that produced ball bearings. Do you remember that case?

Mr. **Rule**. Yes, sir.

Senator **Metzenbaum**. Now, that merger involved the only two companies in the world that were qualified to make ball bearings for some of our Nation's military systems, including certain gyroscope bearings on the Harpoon and Tomahawk missiles and the F16 guidance system, the guidance systems of the Sidewinder, Sparrow and Hawk antiaircraft missiles, and synchro motor for the F-18 Jet, and various aircraft synchro motors for the Clifton Precision.

The two companies were also engaged in head-to-head competition for sales of ball bearings for the F-4 and F-5 weapon control, and jet nozzle area control system.

Obviously, they were the only ones involved in some very, very important bearing manufacture for some of the most important military parts of our defense system. After the merger, the HHI—and that is the index that we all know as the concentration ratio—would have been 3,025; a change of 585 points from before the merger.

Now, the chart shows that these numbers exceed the levels when the Division, absent extraordinary circumstances, will challenge a merger. By how much do these numbers exceed the Justice Department's own standards for mergers that it will challenge absent extraordinary circumstances?

Mr. **Rule**. 1,200 points.

Senator **Metzenbaum**. That is 1,225 points higher, and actually 485 points higher than the guidelines stipulate for a merger to be challenged; is that not correct?

Mr. **Rule**. Well, in terms of the numbers that is true, but there were other factors, and that is, I think, why Assistant Attorney General McGrath decided not to bring the case?

Senator **Metzenbaum**. There were what?

Mr. **Rule**. There were other factors that led Assistant Attorney General McGrath to decide not to bring the case.

Senator **Metzenbaum**. Well, you were the Deputy Assistant Attorney General at the time of this merger, and you deserve credit for agreeing with the staff attorneys and the economists that the merger should be stopped.

But the failure to bring suit is a good example of how misguided the Department's policies have been. As a matter of fact, I think it is important that we take a look at the facts as presented in the staff's recommendation.

At one point they say, "the acquisition would combine two of the five significant firms in this market."

At another point they say, "foreign bearings could not restrain any price increase—they are excluded from the market by regulation. The hypothetical monopolist could, if it wished," and this is still quoting staff, "the hypothetical monopolist could, if it wished, charge higher prices to military end-use customers than to commercial end-use customers," end of quote.

They then go on to say, "in a more qualitative rather than quantitative sense, it is also clear that competition would be significantly reduced."

Now, under those circumstances, how could the Division, under Assistant Attorney General McGrath, ignore these facts and let a dangerously anti-competitive merger go through? And I guess I would say, was there not really a high degree of irresponsibility as far as obeying the law, following the law, is concerned?

Mr. Rule. No, Senator. I think that, in fairness to Assistant Attorney General McGrath, there were a number of other factors and issues that were involved, particularly the question of the ease of entry into these markets.

This case came up in June 1984, as I recall it, very shortly after—or actually it was—the decision came up shortly after our loss in the *Waste Management* case in the second circuit.

The *Waste Management* case essentially threw out a Justice Department successful challenge to a merger on the ground that we had not given adequate sensitivity or paid adequate attention to the ease of entry and its ability to prevent any anticompetitive results from a merger.

There was a concern on the Assistant Attorney General's part that the entry questions were very close. And he recognized, as I think we all recognized, that this was a close case and that it would be a very difficult one to litigate and to win.

Assistant Attorney General McGrath had a very good sense and a very great deal of experience in terms of litigation, and it was his judgment that this was simply not a case that could be won by the Division, that it was a very close case. It was close, when you added it up, and took all the other factors into consideration as to whether it constituted a violation.

But he was concerned, and I think he concluded that it would have been futile, given those problems, to try to litigate the case and stop the merger. I think that certainly those are factors that one has to take into account, and despite the view of some others that we ought to proceed with the litigation even if we lost, because we felt that it would be worthwhile and that there was a problem with this merger, he had to make the call.

It was a very difficult call. He did not make it lightly. He did not make it without serious consideration and reflection. But he was the one who was charged with that decision and he made it, and I think in good faith and responsibly.

Senator Metzenbaum. I wish I could feel that comfortable about Mr. McGrath's action. I think Mr. McGrath totally failed the American people, particularly when we were dealing with defense contractors. Particularly, when you eliminate competition in the defense industry, you increase the cost to the taxpayers, and looking at the Waste Management case is not really an appropriate comparison because that is a garbage collection case.

That is very different. You can collect garbage with some trucks and strong people. But that is not so with ball bearing manufacture. You need skilled engineers, you need expensive facilities, et cetera.

Either you pay attention to your staff or you do not. The staff memoranda clearly stated, and I quote: "There has been no new entry in the military end-use market over the last decade," end of quote.

The reasons for this were also explained in the staff memos. For example, to compete for U.S. military business, ball bearing producers must construct a manufacturing facility in this country.

In addition, there were a whole list of customer qualification processes and testing procedures a company had to go through before it could compete for military business.

Second, the staff memo states that even the parties conclude it would take 1½ to 2 years to enter this market, and significant capital investments between $5 million and $40 million.

Now, what has happened in that area? We have looked into the state of the market at this time. The facts are that, despite Minebea's claims that it would keep New Hampshire Ball Bearing as a viable company, New Hampshire Ball Bearings is no longer a competitive force in the industry. In fact, experts tell me that firms qualified to make miniature and instrument ball bearings for the U.S. military have left the market since the merger.

Fortunately, your position was against that decision. But I must say to you that if Mr. McGrath were up for confirmation this morning instead of you, I can tell you with certainty had I known of that kind of decision, he would never have gotten through this committee. Never.

I think it was such an irresponsible act on his part, an abdication of responsibility, and I think he has done so much harm to the defense industry as well as the free competitive system in this country, that if he does not suffer a sense of embarrassment, it is only because he does not embarrass easily.

Another troubling part of that same case is the following statement in the staff memo. Quote: "It should be noted that while several DOD officials have privately urged us to block the Minebea/New Hampshire transaction, earlier public pronouncements of others are not exactly helpful."

This is the staff speaking: "In September of this year DOD officials testified before a Senate subcommittee concerning this transaction and stated that they did not expect it to result in higher prices for military bearings."

It goes on to say: "A number of lower level DOD personnel have, however, expressed concerns to us about possible price increases by a combined Minebea/New Hampshire entity."

That is about as clear as it could be that that merger, even with the two companies continuing to operate, as had been promised, would have resulted in higher costs.

If the case were to come before you today, the same case, would you bring an action?

Mr. RULE. Senator, if a case came today, as any case would, we would have to look at the conditions in the market today. I stand by my recommendation that I made at the time, to bring the case. I think that we could have worked to, perhaps, develop the case a little more strongly, and I would want to make sure that we did that, so that we did not face the litigation concern, or at least that we minimized it.

But, again, one has to make those decisions at the time based on the circumstances and facts before one. And while I recommended the other way, I do not think that the Assistant Attorney General at the time made an irresponsible or a bad faith decision. I think it was perfectly appropriate for him to make that decision, and I know it was a very difficult one for him.

Senator **Metzenbaum**. I have many more questions, but Senator Humphrey is here and I think it is only fair that I yield to him for a portion of time.

Senator **Humphrey**. I have to go vote in any case, and I have no questions, Mr. Chairman.

Senator **Metzenbaum**. Are we on a rollcall at this point?

Senator **Humphrey**. Yes, sir.

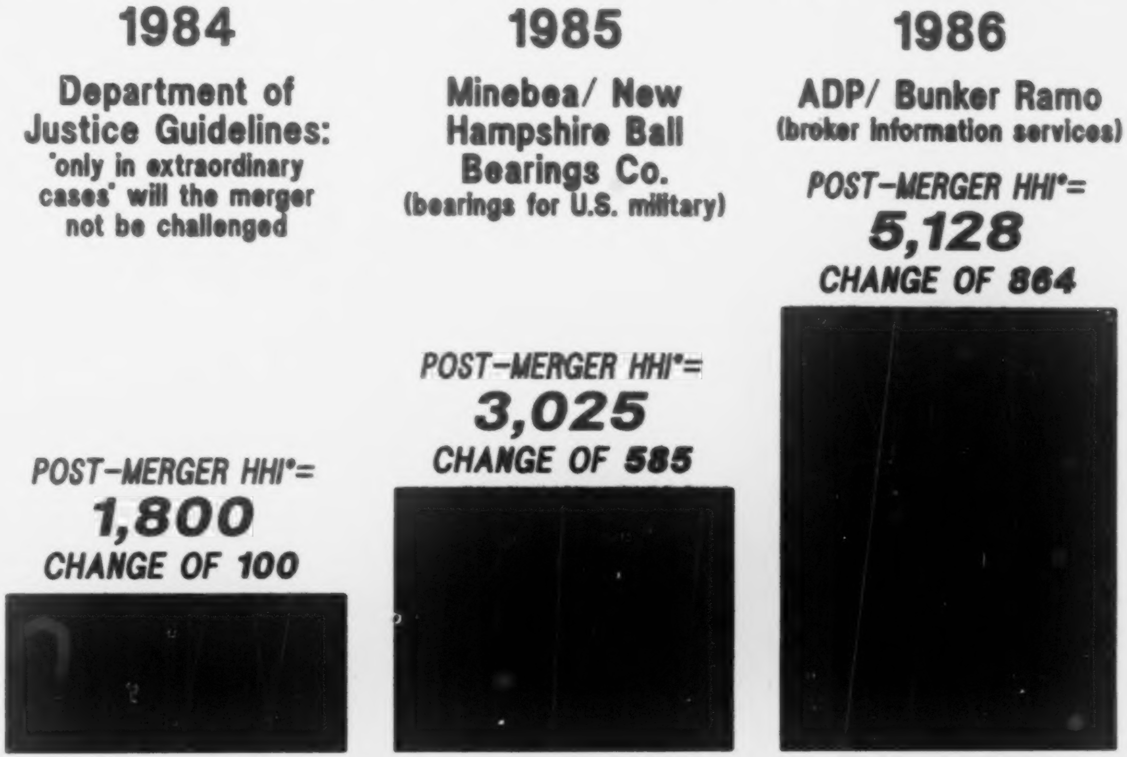
Senator **Metzenbaum**. I guess I have to go vote, too. I am glad you said something.

This committee stands in recess until such time as the Chair gets back.

[Brief recess.]

[Chart follows:]

MERGERS NOT CHALLENGED



* Herfindahl–Hirschman Index

Source: Department of Justice, Antitrust Division Staff Memoranda

Senator **Metzenbaum**. Sorry about the delay.

Mr. Rule, Let's look at a merger that occurred in early 1986. You and Assistant Attorney General Ginsburg were the only persons in the Division who did not want to oppose this merger.

Now, let's look at the facts. The merger combined Bunker Ramo Information Services and Automated Data Processing, Incorporated, two of the three firms offering brokerage information services at the time of the merger.

These services provide up-to-the-minute electronic transmission of stock market quotations, commodity information, options quotations, and other financial information essential to the retail account executive.

The post-merger HHI concentration ratio was 5,128, a change of 864 points from before the merger. I think you can see it over there on the right hand side of the chart.

By how much do these numbers exceed the Department's own HHI guidelines?

Mr. **Rule**. It exceeds 1,800 by 3,300.

Senator **Metzenbaum**. By 3,328 points on the post-merger HHI.

The staff memo stated that several documents produced by the parties suggest that Automated Data Processing was acquiring Bunker Ramo to liquidate it, and therefore reduce competition. The staff stated, "several documents produced by the parties suggest that ADP is acquiring Bunker Ramo to reduce competition. . . . Internal documents suggest that ADP is simply buying Bunker Ramo's market share and will itself liquidate the company in large part."

"Accordingly," said the staff, "we conclude that ADP's acquisition of Bunker Ramo will substantially impair competition," end of quote.

In addition, the staff obtained documentary evidence that Automated Data Processing planned to raise its price 8 percent after the acquisition, although experts were predicting that prices without a merger would fall. In other words, the competitive forces would cause prices to fall.

Despite company denials, the staff believed this price rise was connected with the proposed merger. The staff even recommended a suit under section 1 of the Sherman Act because they had documentary evidence suggesting that ADP and Bunker Ramo had agreed not to compete for customers during the period between public announcement of the acquisition and its consummation.

It would appear to me to be as clear as the nose on your face or my face that this was an anti-competitive merger. This was eliminating one of three major companies in this area. How could you justify the Division's failure to challenge this merger?

Mr. **Rule**. Well, Senator, that was a very difficult case, one that I and the Assistant Attorney General and the staff spent a great deal of time on, and I know the staff worked very hard and responded to a lot of questions that I had and that Doug Ginsburg had and that others had.

The issue, though, there was really twofold. It was a real question of what you might call a *General Dynamics* case. We were involved in an industry that it appeared, and I ultimately believed, was in a state of great change and great flux.

The numbers that you show up here, based on the market shares of the firms, I felt and concluded were really a representation of what had happened in the past, and what was happening in the future, for future contracts, was a whole new generation of services that involved office automation and other services being put together; no longer the use of dumb terminals, which is what ADP and Bunker Ramo had.

Also, there was an indication that Bunker Ramo and ADP were spending tens of millions of dollars to try to come up with this new technology. Bunker Ramo said at the time that it felt if it did not sell this company, it was simply going to live off the contracts it already had and really was not going to be much of a factor in the market. And there was a lot of activity in terms of various firms talking about coming in.

We must have had—I do not know—two or three meetings, and every time we would have a meeting, there would be somebody else who would be expressing an interest in entering or a brokerage firm expressing an interest in providing the service to itself.

Now, the staff every time went out and said, well, you know, this particular entrant, it will probably take too long for them to come in; this particular brokerage service may not be able to do it, and if they do they will not be providing any additional competition.

But ultimately, I concluded that where you have a very dynamic industry involving information services, computers, and telecommunications, I could not conclude that this merger was going to have an anti-competitive effect and I thought that the 5,128 number was misleading as to the effect.

Given that and given the dynamism of technology and given my belief that if we tried the case, by the time we got through we would probably be looking at a totally different market, I felt we should not bring the case.

Senator METZENBAUM. Let me ask you a question. Did the staff address itself to the issue of new technology?

Mr. RULE. Certainly. Because that question I and others raised over and over, and they did address it and they believed that to some extent the new technology issue may have been exaggerated. They also felt that ADP, Quotron, and Bunker Ramo were the firms that were there with the new technology.

And finally, I think there was a belief on the part of the staff that even if the conclusion about new technology was correct, that we would be better off letting Bunker Ramo, if it was not going to have a new technology, simply to live off the contracts and free up those customers for Quotron, and ADP and others, perhaps, to compete on in the future.

And that certainly was an argument that I considered very carefully. Frankly, that case is one of the cases that in my recollection I agonized over the most. I spent a lot of time on it. I listened very carefully. I kept going back to the staff to try to convince me or get me over the edge that we ought to bring this case, from my perspective.

Now, ultimately, Doug Ginsburg made the decision there, listening to me and everybody else, and in part, his reasoning for not bringing the case was somewhat different. It was, in part, based on litigation concerns.

But I feel I have a responsibility to give my best estimation of whether or not the merger violated the law and was going to hurt consumers, and I just did not feel that I could reach that conclusion under *General Dynamics* and the other precedents that were out there, and so I recommended against the case.

Senator **Metzenbaum**. But the staff had said, "Nevertheless, after talking about the new technology, we remain convinced that the acquisition of Bunker Ramo by ADP would significantly impair competition within the periods set forth in the guidelines."

And it goes on to address itself to that whole issue. And frankly, when there are three companies in an area and one of those three buys up one of the others, it almost seems to me to make a case on its face that is evident that competition is going to be affected.

Frankly, Mr. Rule, I can only say to you that it is a great disappointment that you did not see fit to bring that case but instead permitted the merger to go forward, because you did eliminate competition and you do hurt consumers. When you raise the price to some of the people using the equipment, you raise the price all the way along. And there are still only two competitors in the market, Quotron and the merged firm.

Let me also read you what the staff said about smaller operations: "The regional and smaller national firms have expressed concern and apprehension about the acquisition. . . . Their objections were that in an already concentrated market, they were being offered even fewer choices. They will be a de facto ADP customer for the foreseeable future and at their mercy for pricing and services."

They went on to say: "A smaller national broker house argued that the little guy would have two alternatives—to pay Quotron's or ADP's price, or to stop receiving reliable real-time quotations and other services, a prospect that would put the little guy out of business." That is their quote.

The staff's conclusion was that, "under sound industrial organization analysis, the merger guidelines section 7 of the Clayton Act, the loss of a competitor in these circumstances cannot be justified by the possibility of replacement by another at some uncertain time in the future. In sum, this case presents a simple question of how much lost competition will be tolerated in a significant line of commerce which is crucial to the American financial system."

I would think, Mr. Rule, that you not only let down the American people, but I think you let the staff down in that particular case. You ignored the career staff, and I am concerned as to whether you would take the same kind of action again.

Whether or not you could prevail in the case, the fact is that probably the mere threat or indication that you were going to bring an action would have caused that merger to be called off.

Mr. **Rule**. Let me just say, Senator, as I indicated, I agonized over that decision. I think we have a tremendous staff at the Division. I think that staff worked very, very hard and I listened very, very carefully over a number of hours to the arguments that they made.

I think it is very difficult, though, in any of these cases to try to really put one's self at the time in the place of the decision maker and try to reach a decision unless you are able to basically talk to all of the witnesses, listen to the arguments, and try to balance the facts.

I think if you look at the cases that we brought instead of the ones that we did not bring, I generally go with the staff's recommendation when I believe—and I give them a great deal of deference—when I believe that there is a case that is there.

In this case I agonized over it and I just could not, based on my understanding of the facts and what I heard, in good conscience at that time bring the case.

Now, again, as with New Hampshire Ball Bearings, if there were another merger in that industry, I would have to look at it. I would look at it carefully and I would try not to come with a judgment until I have heard all the facts and heard all the arguments, and I would approach it the same way there. But I still, based on what I knew at the time, felt that there was not a violation.

I was, obviously, aware of the very serious litigation difficulties we would have, but my decision was based on the fact that I did not believe at that time—because I felt that we were moving into a different technology and I disagreed with the staff on that—that there was a violation of a law there. That was different from the ultimate conclusion, to some extent, that Doug Ginsburg reached, and he was the one who made the decision.

But I felt it was incumbent upon me to give Doug Ginsburg—as I hope all my deputies and everyone who works for me will give me their best good faith determination and judgment as to what we should do in a particular case, and that is what I was trying to give to then AAG Ginsburg.

Senator **Metzenbaum**. Well, we have been joined by the distinguished ranking member of this committee, Senator Thurmond. I have included your opening statement, but if you care to make it orally, or to make any other statement, we are happy to have you do so.

Senator **Thurmond**. That is all right. It has already been put in. Thank you very much, Mr. Chairman.

I had to go to the White House for a weekly meeting. I am sorry I could not be here when it began.

As I understand, Mr. Rule, Mr. Ginsburg made the primary decision in this case; did he not?

Mr. **Rule**. Yes, sir, he did.

Senator **Thurmond**. And the operations unit, the career people in the Justice Department, felt that was a correct decision, and so did you after you looked into it?

Mr. **Rule**. Well, in Bunker Ramo, because I recommended that that is the way it should come out, I did feel it was a correct decision. I think that the Office of Operations ultimately was, perhaps, ambivalent about whether or not to bring a case, and I think they recognized that Doug Ginsburg's decision was not unreasonable.

I think, though, in fairness, the career staff thinks that that decision was a mistake, and I daresay that if you asked them, they would probably say that today.

Senator **Metzenbaum**. Was a mistake, is what you said?

Mr. **Rule**. Was a mistake, right.

Senator **Thurmond**. As I understand it, three other firms were on the edge of the market and about to enter?

Mr. **Rule**. There were a number of firms that were trying to enter. For example, Wang had acquired a firm called Wallis-Greenwood and was entering the market in a very big way with a service called Shark that was just beginning at the time and I understand has made some inroads into the market.

There are other firms—the name escapes me right now—a smaller firm that the staff did not believe was going to be a very significant player that I have heard rumors, and this is really rank hearsay, that they are beginning to make some inroads in the market. It is PC Quote, I have been reminded.

The market is very dynamic and seems to be changing.

Now, it is true that ADP/Bunker Ramo, and Quotron are the two main services, still, as I understand it. I have not gone back to study it, but I do think the market is still in a great deal of technological flux.

Senator **Thurmond**. Is it correct that the six large brokerage firms who were the customers of the merging firms were already developing their own in-house systems which would make it very unlikely that the merged firms could obtain any market power?

Mr. **Rule**. That is certainly the case, and one reason that there was a focus on really sort of the mid-range regional brokers was because none of the large brokers, none of the major firms, seemed to be terribly concerned because they believed they could develop their own service, and indeed, a number of them were developing their own service.

The very smallest of the brokers were able to use the PC Quote system at that time, and so there was less of a concern for them, and it was that sort of mid-range where we found the only expression of customer concern, and there was some customer concern in that area.

Senator **Thurmond**. Where a case is clear cut, there is not much trouble arriving at a decision about a suit, is there?

Mr. **Rule**. No, sir, there is not.

Senator **Thurmond**. Where it is a marginal matter I guess it does take considerable study to try to arrive at a sound conclusion as to whether to bring a suit or not, and in this case Mr. Ginsburg decided that it would be unwise to bring a suit, and after you looked into it and studied it carefully, I believe you decided that was the right decision.

Mr. **Rule**. Yes, sir, I did. I might just add that I tend to agree with you. I mean, where folks in that job earn their money is agonizing over these decisions. And it is very tough to make a call and to tell the staff that you are not going to bring a case when you believe you should not bring one.

But it seems to me that that is incumbent upon us. It is a lot easier to tell people when you are going to challenge them, although, believe me, there is a lot of wailing and gnashing of teeth because they think that the case—the other side—thinks the case is wrong, often, and argue very vigorously.

It is rare that the easy case comes to us. It is invariably the very tough case, and where it is a very tough case we spend a substantial amount of time puzzling through the answer so that we hope we arrive at the correct answer.

Senator THURMOND. With regard to merger cases, is it true that these cases are usually very complex with many facts and witnesses, often requiring knowledge of the industry for proper analyses, and is it not true that in these close-call situations it is important to have a full understanding of the facts?

Mr. RULE. It definitely is, and it is very difficult, without actually listening to the arguments on the other side, hearing them, hearing the people that they would put on the stand, looking very thoroughly and carefully at all the facts, it is very difficult, I think, to try to arrive at the correct decision.

And even then, the questions are often close, but again, our constitutional responsibility is to faithfully enforce and execute the law, and that is what we try to do.

Senator THURMOND. I think I could see where it would be very difficult to second guess a litigation decision which is based on appraisal of all the facts. There are some cases which are very close, but you have to make a decision one way or the other, and the decision by Mr. Ginsburg, I presume, was made sincerely and honestly and what he thought was best.

And I presume that you made such a decision yourself based the same way?

Mr. RULE. Yes, sir. That is true. I think Doug Ginsburg has proven that he is a man of highest integrity and that is the way he approached his job in the Division and I think that is the way he approaches his job now in the Court of Appeals.

Senator THURMOND. I believe Senator Metzenbaum referred to merger cases in which the staff recommended a suit but the head of a Division disagreed. Now, is it not true that in several cases senior career staff also disagreed with the lower staff recommendations and you agreed with the senior career staff?

Mr. RULE. Yes, sir. It might be helpful for the committee to know how the Division is set up. We have got a number of sections in the Division, 12 of which actually handle litigation. They make recommendations to what is known as our Office of Operations, and the Office of Operations has a director and a deputy director who are both, really, the senior career personnel in the Division, they last through administrations. And generally there is often a litigation deputy who is also a career individual.

And those individuals are the ones who see everything that is going on in the Division, see all the investigations, see all the case recommendations. In many of those cases—now, it is not true in Bunker Ramo and it is not true in New Hampshire Ball Bearing—but in many of those 10 cases the Office of Operations recommended against a case.

And so, oftentimes, the decision came down to which career staff to go along with. And again, that is not to say that the chief of the section was making an unreasonable recommendation, because I do not think any of these were unreasonable. But again, they were close calls and in many cases the more senior career people felt that a case would be inappropriate.

Senator THURMOND. Where a case is complex, is very difficult, a decision has to be made, and in this case you took all the facts into consideration and you reached the same conclusion after studying the case well, and Mr. Ginsburg did?

Mr. Rule. Yes, sir. I certainly reached the same result, perhaps for slightly different reasons. But I reached the conclusion that it should not be brought, and I made that recommendation to Doug Ginsburg and he ultimately did not bring the case.

Senator Thurmond. Anyone, I guess, could differ with the decision and say they might have done it differently, and they might have done it differently. It might have come out differently. But you never know.

When you have a case, a lawyer has to decide whether he is going to settle it or try it. He has to decide whether it is worth the risk of going to trial if the facts are very close and maybe some disputed.

So all an honest lawyer can do is use his best judgment and decide the best way he can.

Is that the way you did here?

Mr. Rule. That is certainly the way I did it here, and that is the way I try to do it in every case, and in the vast majority of the cases I end up going along with the staff because they persuade me that that is the correct decision.

Senator Thurmond. I think you have made a fine record down at the Department of Justice and I think people who know you have great confidence in your character and your integrity and your capacity. I hope you will be confirmed. I will certainly support you.

Mr. Rule. Thank you, Senator. I appreciate that.

Senator Metzenbaum. I would like to say to my distinguished colleague that earlier Mr. Rule had indicated that, speaking for the Administration, they would like to give the Government the right to sue and gain treble damages, and I told him that if I can prevail upon you to join with me, that I would be prepared to put a bill in to that effect.

I think we can move it through the Committee very promptly and pass it within almost a week or two if you are inclined to join. I want to say publicly that you and I have worked together on previous legislation and I would be happy to join with you on that, which I do not think is that controversial, at least between Mr. Rule and me.

Senator Thurmond. Well, Senator, I think I could consider seriously going along with treble damages.

Senator Metzenbaum. Very good. We will talk further, and if it is all right we will put something together.

Senator Thurmond. I will talk further with you about it.

Senator Metzenbaum. Very good. Thank you.

Now, Mr. Rule, I asked you for the number of resale price maintenance cases that the Division has filed during this administration. Your updated letter claims the Division filed one case during 1981.

Who was head of the Division when this case was filed? And what happened to it?

Mr. Rule. The one case was filed by Sandy Litvack when he was the Assistant Attorney General, and it was dismissed, I believe it was in June 1981 when Bill Baxter was the Assistant Attorney General.

Senator **Metzenbaum**. So that it was filed by the hold-over, Sandy Litvack, from the Carter administration and dismissed by Bill Baxter, with prejudice, as I understand it; is that correct?

Mr. **Rule**. Yes, sir. That is correct.

Senator **Metzenbaum**. So that was the only resale price maintenance case that was filed during the last 6½ years?

Mr. **Rule**. That is right. There have been none filed since Bill Baxter's time, or since——

Senator **Metzenbaum**. There have been what?

Mr. **Rule**. There have been none filed since Sandy Litvack's time. Let me put it that way.

Senator **Metzenbaum**. Yes. And resale price maintenance has to do with the fact that the manufacturer tells the retailer at what price he has to sell the product, or she has to sell the product; is that right?

Mr. **Rule**. That is right. Yes, sir.

Senator **Metzenbaum**. So it is a matter of major concern to the consumers of this country; would you agree to that?

Mr. **Rule**. There has certainly been a great deal of concern expressed. That is true. Yes, sir.

Senator **Metzenbaum**. Do you know how many cases were filed during the 4 years of the Carter administration?

Mr. **Rule**. I have that number, but you may have it more handy than I do.

Senator **Metzenbaum**. I think it is five.

Mr. **Rule**. Five. OK.

Senator **Metzenbaum**. Five in 4 years, zip in 6½ years. You would not suggest that there have been no resale price maintenance issues that have occurred since Mr. Reagan became President?

Mr. **Rule**. Well, I would not claim that because I do not—no, I would not claim that. But let me say this. One of the things that has happened is the courts have issued a number of decisions in the area of vertical restraints, starting with the *Sylvania* decision and subsequently with the *Monsanto* decision.

The fact is—and I recognize that the Chairman has a great deal of concern and disagrees with the *Monsanto* decision—but that is the law and it makes it much more difficult to establish a resale price maintenance agreement. And the reason that that standard, in part, I think, has developed is in order for the courts to try to accommodate the rule in *Dr. Miles* and the rule in *Sylvania*.

So it has become more difficult to bring resale price maintenance cases. I think if you look at the private cases, that bears out.

I also think, though, since—I know since 1984 the Division has made it very clear—and I will reiterate it today—that we recognize that resale price maintenance is per se unlawful and that anyone who engages in resale price maintenance is violating the law, and that if we find resale price maintenance and there is a case there, we will treat it as any other recommendation that is made.

I think anybody who is considering resale price maintenance would be exceedingly unwise to engage in it, and my strongest counsel to them would be not to do it. Because not only will they have to face us, perhaps the FTC, and the State Attorneys General, but they will also have to face the specter of treble damage lawsuits.

Senator **Metzenbaum**. Well, I appreciate your comment on it, but I am saddened by the lack of action that has occurred in the last six and a half years. I might say to you that my bill does address the *Monsanto* case and the evidentiary problem.

It is bad enough, frankly, that the administration's enforcement record on resale price maintenance is non-existent. But the fact is that the administration is doing more to undermine the law against resale price maintenance than it is to enforce it.

Let's not overlook the fact, Congress has made its will very clear on this. Congress actually added to an appropriations bill, I think three separate times, if my recollection serves me right, a prohibition against expending any Federal funds for the purpose of going into court to upset the resale price maintenance law as it presently exists.

Mr. **Rule**. Right.

Senator **Metzenbaum**. In 1984 the Supreme Court considered a resale price maintenance case called *Monsanto,* you just mentioned. And in the *amicus* brief that the Department filed in the case, the Division urged the Supreme Court to overrule the *per se* rule against resale price maintenance.

Let me ask you, what role did you play in the Division's formulation of its position in that matter?

Mr. **Rule**. I was a special assistant at the time in the Division. Actually, the brief was written prior to the rider being put on our appropriations bill by Congress, and in fact, that is what motivated, I think, the rider.

But I was a special assistant at the time in the Division and I did work on—as well as, so far as I can recall, virtually everybody else in the front office of the Division worked on—that brief. I made comments on it, and at the time agreed with the substantive argument that was made in the brief.

But ultimately, Bill Baxter made the recommendation to the Solicitor General's Office. The Solicitor General's Office filed it. But as a special assistant I did get involved, as did other special assistants.

Senator **Metzenbaum**. Let me ask you this. You worked on the brief. Bill Baxter filed the brief. He made the ultimate decision. You are part of the Attorney General's Office at the Department of Justice. You are sworn to uphold the law. The law states that resale price maintenance is a *per se* violation.

The question that I have is, where do you get the thought, the idea, the right to use the valuable time of Government employees, including yourself, working on a brief in support of a defendant in opposition to the law as it presently is? And is that consistent with an administration that considers itself strongly committed to law enforcement?

Can the street criminal, can he or she violate the law, saying that they do not believe in it? But here you are going into court, spending taxpayers' dollars in attempting to upset the law as it has been written, and only stopped from doing it when Congress says, you may not do it.

It was a Republican Member of this United States Senate who authored the antitrust laws. My question is, What goes on in your brains that permits you to spend taxpayers' dollars? You are coming to us and telling us you do not have enough money on some occasions. The next time, you come along and ask to cut the number of slots in the Antitrust Division.

But what gives you the authority to come into court saying the law is this, but we want it changed?

Mr. RULE. OK. The Division has had a history, even before this administration, of filing amicus briefs, first.

Second, the brief, when it was filed, was based on an argument rejected—although not really addressed—but rejected, at least in dictum and in a concurring opinion by the Supreme Court that changes in the law since 1911, or whenever *Dr. Miles* was decided, had suggested that, as in the case of *Schwinn,* it was now time to overrule *Dr. Miles.*

We made that argument, as we have made other arguments in other cases, as amicus. We lost. You all passed the rider. We recognized that—and my intent is to continue to say that we are not going to create a confrontation with Congress, we are not going to spend the money to make those arguments.

The court has said that resale price maintenance is per se unlawful. We will enforce it that way until the Court in its wisdom decides, without our help, to reverse that decision. One of the things I have said, and one of the reasons I believe that we can take a 100 person cut in the Division, is because I think we ought to de-emphasize our *amicus* program.

To the extent we file *amicus* briefs, I believe we ought to do it only when we are invited by the Court or there are special circumstances. Today is 1987. That case occurred in 1983, and a great deal has happened in between.

Senator METZENBAUM. Well, recently you filed an *amicus* brief in the Supreme Court concerning a resale price maintenance case called *Business Electronics* v. *Sharp.* The facts of that case were that a discounter was cut off by a manufacturer of calculators. The jury found that there was an agreement or understanding between the manufacturer and a full price retailer to terminate the discounter as a dealer because of the discounter's price cutting.

I know you signed the Division's brief in that case. Do you personally agree that such an agreement—or let me put it another way. Should not such an agreement be automatically illegal? And how did you get around the congressional restraint on your expending Federal funds for that purpose?

Mr. RULE. Well, first of all, I think, and I would encourage you to look at what we said, because we tried very hard—I tried very hard—to make it clear in our brief that we were not challenging the rule in *Dr. Miles.*

The Court in that case asked us for our views. One of the issues in the cross-petition was whether or not the Court ought to take the case to reconsider the rule in *Dr. Miles.* We said we thought it was interlocutory and we were not going to create a confrontation with Congress.

We said at several points—at least one point that I know of that we were not challenging or seeking to change *Dr. Miles* in the discussion of the petition issue. And what we recommended to the Supreme Court was not to take the case.

The reason we recommended that is because we felt the decision of the lower Court, the Court of Appeals, was generally consistent with the trend in the courts in terms of how they have tried to reconcile *Monsanto-Sylvania* on one side and *Dr. Miles* on the other. And the only conflict existed, really, with cases and in circuits that had established their rule prior to *Monsanto.*

We felt that the decision in this case was consistent with the trend in the cases and therefore the Court should not spend its time. But we did not do it because—we did not go out of our way to do it. We did it because the Court invited us, and then we did it in a way that I felt—and I think everybody else in the Department felt—avoided any issue under the rider.

We were very careful—at least I tried to be very careful—not to create a problem, not to create a confrontation, not to violate that language in our rider.

Senator METZENBAUM. If you did not violate the rider, did you violate the spirit of the rider?

Mr. RULE. No, sir, I really do not think we did. I certainly did not intend to. But it seems to me that when you are talking about an issue where the Supreme Court asks for our views and where we expressly say we are not trying to change the *Dr. Miles* rule or overturn it, and where we explicitly refuse to tell the Court to grant certiorari to consider the issue and where we simply point out, giving the Court, as it rightfully expects, our best view of what the case law requires and whether or not there is a conflict in the circuits and whether or not the case is cert worthy, it seems to me that the Attorney General, the Solicitor General, and everybody who works in the Department has an obligation, if we want to get along with the Court, to respond to their invitation and give them our best view.

I think we did it in this case without violating the rider and, frankly, trying to be as careful as we could not to violate the rider. And I might just add two things. One reason that I think that is true is that when Bill Baxter made his argument before the Supreme Court in *Monsanto,* the rider had already been attached to our appropriations bill, and Bill avoided addressing the *Dr. Miles* issue and said so before the Court.

Essentially he addressed the same sort of issues that we addressed in the *Sharp* brief. But after that argument we did not hear, so far as I know, of any concern on the Hill that Bill had violated the rider.

Subsequently, the Court asked us for our views in a case out of the tenth circuit that raised a question of whether or not certain conduct constituted resale price maintenance. The Court below found that it had not.

We, at the Court's invitation, submitted a brief saying we did not think the Court should grant cert because we did not think it was resale price maintenance and that the Court below had acted properly.

Again, we did not hear any expressions of concern from the Hill that we were violating the letter or the spirit of the rider. I do not really think that this brief was any different. I knew that your staff and the staffs on the House side were concerned about it, and I was, frankly, very conscious of it, as I think everybody was in the Department, to make sure that we did not create a confrontation with Congress.

Senator **Metzenbaum**. We will see to it in the future you hear more expressions of concern.

Now, you were Baxter's special assistant when the Division argued in the *Monsanto* case that the *per se* rule against vertical price fixing should be overruled. You testified against the Retail Competition Enforcement Act of 1987, and you were the acting head of the Division when the *Sharp* brief was filed.

Is it fair to say that every time since 1983 that the Division has dealt with a resale price maintenance case, you argued to cut back the law?

Mr. **Rule**. Well, certainly, what I intended to do every time I have tried to address it, Senator, is deal with the law as it is. I, frankly, do not think it makes any sense, regardless of what I think about the current rule on resale price maintenance, I think that I am much better off, and I think the Division is much better off, simply taking itself out of the debate about whether or not *Dr. Miles* ought to be reversed.

Now, what we said with respect to the bill that we commented on was simply that we felt that it would create certain problems, that even if one believed that resale price maintenance should under all circumstances be illegal, we felt there were certain concerns and we tried to express those to the committee.

In *Sharp* we tried to express what we thought was the right result in light of *Monsanto* and simply told the Court we did not think they needed to readdress the issue. I do not know—I mean, I suppose different people can characterize it different ways. I, again, was trying to, as I think everybody has who has addressed the issue in the Division, act in good faith and responsibly, and generally I have not tried, and I do not intend to try to provoke a confrontation with Congress on the issue.

Senator **Metzenbaum**. Mr. Rule, let me ask you straight out with a yes or no. Will you enforce congressional intent concerning resale price maintenance if you are confirmed?

Mr. **Rule**. Yes.

Senator **Metzenbaum**. All right.

Senator Thurmond, I have some other questions, but I did not know if you wanted at this point to take on a series of questions yourself, and I will yield to you.

Senator **Thurmond**. I might just make a statement now. On the *Illinois Brick* question that came up as raised by you earlier, I just wanted to say, did not the Supreme Court decide—and wisely, I think—that we achieved the maximum deterrence against price fixing by giving the right to sue only to direct purchasers? My own strong view is that the *Illinois Brick* rule should not be reversed, and I doubt seriously that any *Illinois Brick* legislation could pass the Senate.

Now, with regard to investigations of possible vertical price fixing, isn't it true that once you begin looking into allegations, you usually find that they involve the termination of a dealer and a complicated relationship between the manufacturer and that dealer, so that it is not a clear cut price fixing situation after all?

Mr. **Rule**. Yes, sir. That is often the case. There may be resale price maintenance in some of those cases, and we, as the committee knows from our responses to some questions, have investigated and are investigating certain allegations of resale price maintenance.

In appropriate circumstances, where the allegations seem to warrant it and get us involved in more than just a contract dispute, and where there really is resale price maintenance on a national scope, the staff will investigate it.

Senator **Thurmond**. Mr. Chairman, that is all I have at this time. Thank you.

Senator **Metzenbaum**. Mr. Rule, I want to ask you some questions about the *AT&T* case.

Mr. **Rule**. OK.

Senator **Metzenbaum**. I am concerned that the Department has not adequately enforced the AT&T decree that the Department entered into in 1982. That decree required AT&T to be broken up into smaller companies and prohibited the baby Bells from getting into other areas of business, such as manufacturing, to avoid the types of abuses that AT&T had engaged in.

I know the Department wants the decree to be modified, but until it is modified you have an obligation, a legal obligation, to enforce it. Yet just last week Judge Greene, who is responsible for overseeing the implementation of the decree, issued an order directing the Department to explain, quote, "what appear to be failures or refusals of the Department of Justice to carry out its responsibilities under the decree."

That is a very unusual kind of order to come down from a Federal Judge. Now, my question is, how do you explain this order of the Federal Judge telling you to do that which you are legally obligated to do and ethically obligated to do?

Mr. **Rule**. Well, I, along with the Division, on behalf of the United States and the Department responded in 40 pages to those concerns. I believe that each one of the allegations was made by people who either did not like the result of how we interpreted the decree, or who do not like what we have recommended to the Court.

But what we made clear in those 40 pages, I hope, by both dealing with the specific allegations that were made of nonenforcement and by setting out the areas where we actually have been enforcing it, where the Court did not raise issues, is that we take our obligation very seriously.

We have told the staff, and I think the staff takes their obligation very seriously, to enforce the decree. If a decree restriction is violated, then we will take appropriate action. Oftentimes, when we feel the decree has been violated, the parties involved cease engaging in the conduct. If they, though, clearly violate the decree and there is willfulness in their violation, then, even if they cease, appropriate sanctions may be necessary. We have not seen that situation, but if it developed we would pursue it.

Whether or not I think a particular restriction in a decree is a good idea or a bad idea is irrelevant to my obligation to enforce the decree. I recognize that, and I believe that that 40 page discussion of how we have handled these issues indicates that the Department has enforced in good faith the restrictions and the various other provisions of the *AT&T* decree.

Senator **Metzenbaum**. In the years that you have been practicing law, or even when you were a student of the law, do you have any previous recollection of any instance in which a court has handed down an order such as that against a public official telling them to enforce the law that it is their sworn legal obligation to enforce?

Mr. **Rule**. Well, let me—first, I would characterize Judge Greene's order a little bit differently. What Judge Greene had before him in the various comments that had been made were allegations of failure to enforce the decree. Judge Greene's action was perfectly appropriate, because, indeed, when we in the Division saw some of those allegations, we wanted to check into them and see whether there was any substance to them.

Judge Greene simply asked if there were anything to these allegations, because they are serious and they give me a great deal of concern. And I think we responded to those concerns that Judge Greene expressed. I do not know, and I cannot say that I by any means have tried to do a survey regarding any other order such as that. But I do not think that order can be viewed as a conclusion by Judge Greene that we failed to enforce the decree.

Senator **Metzenbaum**. It is pretty conclusive to me. He ordered that,

> The Department shall file within 20 days hereof a response to the allegations referred to above in order that the Court may decide what further steps, if any, should be taken to remedy what appears to be failures or refusals of the Department of Justice to carry out its responsibilities under the decree, and violations of the decree by others.

That is pretty strong language.

Mr. **Rule**. Well, Senator, that order was issued before we responded to the allegations. Now, I think if you look at the response that we gave, we responded in detail and pointed out that with respect to at least three of those issues, we had either taken action or determined that there was not a violation of the decree.

With respect to manufacturing the issue is much more difficult. We could not conclude that there was a clear violation of the decree, because there was not fabrication involved. It involved a very difficult issue that the staff had studied for a long time, and we felt that, particularly in light of the Court of Appeals decision with respect to our interpretation of out-of-region exchange services, that we had been told not to try to broaden the decree and its meaning unless we had language and history in the decree or the purposes of the decree supported that.

We had a very difficult time reaching that conclusion in manufacturing. I think that if you read those explanations, if you read the facts and the way we handled those situations, I think that you will recognize that these are very, very complex, very, very difficult issues, that we have tried our best, in good faith, to resolve, and that we have appropriately enforced the decree.

I believe that that is the conclusion, and I certainly hope that is the conclusion, that the Judge will reach when he reads our filing.

Senator **Metzenbaum**. Last week I sent you a letter asking about allegations that the Department had failed to enforce the *AT&T* decree. One of my questions was, "Have staff attorneys in the Antitrust Division recommended, formally or informally, that investigations or enforcement action should be taken in any of the cases described above?"

Your response to this question was merely to say, quote, that you have not overruled any recommendations by the responsible section chief for or against investigation or enforcement action with respect to any matters discussed in my letter.

This response does not fully answer my question. While it refers to recommendations by section chiefs, I expressly asked about recommendations by staff attorneys who work beneath them.

Let me ask my question again. Have any staff attorneys recommended, formally or informally, to any of their superiors in the Division that investigations or enforcement action should be taken in any of the matters discussed in my letter to you?

Mr. **Rule**. Senator, as the letter also explained, several of these issues are issues that may be litigated, that are not over. For example, AT&T has the right to go into court on the manufacturing issue. On some of these other issues, we may. In fact, the two allegations that you raised about enforcement in your letter that were not raised in the Judge's order are relatively recent claims of violations of the decree and they are currently under investigation.

In other words, we may actually be going into court and litigating those issues. But I can say this, I think that, as in any matter that I have ever been involved with or ever been familiar with, it is very rare that people do not have different views on issues and that some people might think that gee, we ought to do this, and other people might think that gee, we ought to do that.

But the senior—the career individual who—for example, in the merger cases we were talking about that you were interested in, was the section chief. And the section chief did not make a recommendation and no recommendation reached us that we did not follow through on.

Senator **Metzenbaum**. Well, I have asked you by letter, and now I have asked you orally, and now I ask you the second time orally; have any of the staff attorneys recommended, formally or informally, to any of their superiors in the Division that investigations or enforcement action be taken in any of the matters discussed in my letter to you? The answer to that is just yes or no.

Senator **Thurmond**. I think he would have a right to explain his answer, Senator.

Senator **Metzenbaum**. Yes, but I think he can explain it after he answers it.

Mr. **Rule**. Well, I would say—there have been disagreements among the staff with respect to these issues.

Senator **Metzenbaum**. Does that mean that there have been some who have recommended——

Mr. **Rule**. There have been some who felt that we should do some other things than we have actually done, but that is typical of most situations that I have been involved in in the Division.

Senator **Metzenbaum**. So that the answer is yes?

Mr. **Rule**. I——

Senator THURMOND. As large a staff as you have, you are bound to have some that disagree, I guess.

Mr. RULE. I think that is——

Senator THURMOND. They would not be lawyers, otherwise, would they?

Mr. RULE. Not in my experience, no, sir.

Senator METZENBAUM. The answer is yes?

Mr. RULE. Senator, I—you know, if by saying that, if we go into court now and we are trying to prosecute somebody for a violation of the decree and I answer the question yes or no, then we open up a whole new issue that may allow somebody to delay justice. And the fact is that every one of the allegations that were made in the Judge's order and in your letter have been or will be investigated.

What the final outcome is, I imagine as in all cases there will be differences of opinion on the staff. So I think that we are all better off—I think you understand what I am saying—I think we are all better off to let—in the interest of law enforcement—to let the answer stand as it is.

Senator METZENBAUM. I am going to ask Justin next and see what he says. I could get a better answer out of him. Justin is his little baby that is out there.

Senator THURMOND. That is a fine looking baby.

Senator METZENBAUM. One of the most troubling areas is the Department's failure to enforce the decree's restrictions on the regional Bell Companies manufacturing equipment. Complaints about violations of the decree in this area go back to April 1985 when AT&T filed a lengthy submission with the Court alleging possible violations of the manufacturing restrictions in five areas by various companies.

Since that time a number of other complaints of violations have been made. As I understand the Department's position, you agree that there have been a number of cases where the regional Bell Companies have become involved in designing, engineering and developing products, but that these activities are not clearly prohibited under the decree because they are not engaged in "fabrication." Is that correct?

Mr. RULE. That is part of it. The reason that the explanation of manufacturing is so long is because it is so complex and it is not, frankly, easy to boil it down to one sentence, unfortunately, because it is such a complex issue.

There were arguments—I mean, the Bell Operating Companies had some very good citations that they could go to arguing that manufacturing was fabrication. We had to be concerned about our interpretation of manufacturing and how it affected the ability of the Bell Operating Companies to procure telecommunications equipment for their own network, and the difficulties that might be generated if we said they could not engage in design and testing in terms of getting that equipment.

And also, we just did not have a historical record, which at least we had in the out-of-region exchange services. We did not have a historical record to indicate that manufacturing went further than fabrication. We could not conclude—and we looked at it very carefully and the staff studied it for a very long time—that the activities of the Bell companies in these cases were harming competition.

Now, we said that we would continue to keep an eye on it. When other allegations have come up we have certainly looked to see whether or not there were clear violations of the fabrication aspect. But the manufacturing issue is a very, very difficult one and a very, very complex one.

I think we acted in good faith in dealing with those issues.

Senator **Metzenbaum**. But did not the Department itself argue in 1984 that engaging in engineering and design activities could present competitive problems? For example, the Department stated in a submission to the Court on February 26, 1984, "Bell South's provision of these functions which involve the design and engineering of communications network or equipment clearly raise serious competitive issues."

Mr. **Rule**. I am not familiar with that passage, but I will assume that that comes from a brief we filed.

Senator **Metzenbaum**. All right. The statement you filed with the Court yesterday says that, "these design, engineering and developing activities by the Bell companies are arguably, although not clearly, permitted."

The fact is that you do not know if they are permitted or not, do you?

Mr. **Rule**. I would say that we have not reached a conclusion. That is right.

Senator **Metzenbaum**. Why did you not go to the Court, then, and ask for an interpretation of the decree? Why did you simply sit on your hands for two years without acting in all of these complaints or violations? Your statement, as I understand it, says, "Having determined that it would not be reasonable to institute an enforcement action, we considered seeking declaratory relief from the Court. In the absence of any perceived danger to competition presented by the then pending complaints, we concluded that the potential gain did not justify the effort that would be required."

My real question is, you sat back, you did nothing, whereas in 1984 you seemed to indicate that it was a violation and then for 2 years you did nothing because you were not certain what to do.

Mr. **Rule**. Well, let me first make one point, and that is that AT&T was the original complainant, and AT&T could go to court—it did not—if it so desired.

But the reason that we did not try to go to the Court on this issue when we reached the point we did in the summer of 1986 was a view that going to the Court in this area would, at best, after a lot of briefing, after a lot of time in the Court, at best it would come up with a judgment as to a particular matter. And the Court would have to know all the facts, and the decision would probably be very closely related only to those facts and it probably would have provided very little guidance for the Court in the future.

There was a concern, particularly since a lot of these were customer premises equipment issues, that asking the Court to give us an opinion on that without knowing the ramifications for the procurement of telecommunications equipment, might have some very negative ramifications.

We did not know, but we made a decision at the time based on what we thought was the best course of action, unless we discovered that it was having an adverse effect on competition. We did not have any evidence that it was.

We thought, perhaps, Dr. Huber's study of the industry would provide that evidence. It did not. And so we did not feel, given all the other things the Court was focusing on and that we were dealing with in decree, that it made sense to go up on these individual issues.

Senator **Metzenbaum**. I understand that there was a meeting last week at the Department of Commerce involving the Antitrust Division staff, and the meeting was called at the request of the Council of Economic Advisors to express concern about inadequate enforcement of the decree.

My question is, what specific concerns were expressed by the Council of Economic Advisers? Did they advocate stronger enforcement of the decree? Did they express the concern that the regional Bell companies were engaging in cross-subsidizing of activities outside the business of providing local telephone service?

Mr. **Rule**. I was not at the meeting. As I understand the Council of Economic Advisors 'concerns, it did not have to do with our enforcement of the decree. I can check and find out, but as I understood their concerns, they were with the recommendations that we were making to the Court.

The Council of Economic Advisers, as well as other economists, believe that the only way one can deal with rate regulated monopolists and their relationship to competitive industries is to restrict them strictly to providing the rate regulated monopoly service, and that allowing them at all to provide any competitive service creates a risk of cross-subsidization, and any risk of cross-subsidization cannot be tolerated because of the adverse affect on the rate regulated rate payers.

Now, I understand that argument, and there is credibility to it. And indeed the Department, in 1982 when it presented the decree to Judge Greene, based the decree on that theory, a quarantine theory. And the Bell Operating Companies would have been restricted to providing rate regulated services until they lost their bottleneck monopoly.

Judge Greene rejected that theory and he rejected a decree based on it as too simplistic. Instead, he allowed the Bell Operating Companies into customer premises equipment, he allowed them into Yellow Pages, and he said that they could get into other businesses, not based on whether or not there was a bottleneck monopoly, but whether or not their entry into those other markets created a threat to competition in those markets.

That is a different standard from the standard that some economists, the CEA, would like to pursue. And the fact is that we had to make our recommendations, which they are not entirely satisfied with, based on the standard that Judge Greene laid out. If there is a concern about cross-subsidization—and we have never said there is not such a concern—that is a concern about the effects on rate payers.

That is what the FCC is mandated to do. That is what State PUCs are mandated to do, and they should take very good care that they do not allow cross-subsidies that harm their rate payers, and they have the tools to do it.

Senator **Metzenbaum**. Mr. Rule, the man that sits next to me holds the all-time record for filibusters in the United States Senate. I was getting a little bit concerned, as I saw the clock ticking away and we have a roll call, that you were going to exceed his record. So I suggest to you that you terminate your answer. [Laughter.]

Mr. **Rule**. I think his record will be intact for several years to come.

Senator **Metzenbaum**. Having said that, as soon as my colleague is prepared to terminate his questions, I am prepared to call this hearing to a conclusion. We appreciate your cooperation.

Senator Thurmond.

Senator **Thurmond**. Mr. Chairman, I was afraid you were about to compete with me in the questions you have been asking. [Laughter.]

Mr. **Rule**. Senator, if I might just say, I appreciate this. I look forward to working with you, and I want to compliment your staff on the excellent job they have done, and you have done in asking the questions.

Senator **Metzenbaum**. The smartest thing you did was to bring Justin along with you. [Laughter.]

I want you to know right now, you softened up the Chairman.

Mr. **Rule**. He is the smartest thing, and my wife.

Senator **Metzenbaum**. That is what you did.

Mr. **Rule**. Thank you, Mr. Chairman.

Senator **Thurmond**. Let me make this statement. With respect to the AT&T matter, we have been talking about allegations by certain parties. Other parties may have violated the terms of the Court order. Is it not true that AT&T itself has standing to go into court and make such complaints if it has reason to believe that violations have occurred?

Mr. **Rule**. Yes, sir, they do, and they have in the past.

Senator **Thurmond**. What is to prevent AT&T from pointing out areas of concern to the court? There is not objection to that, is there?

Mr. **Rule**. No, they certainly can, and as I say, they have in the past. They objected to our interpretation of whether or not operator services that the Bell Operating Companies wanted to provide violated the decree, and they have gone into Court to ask Judge Greene to clarify that.

Senator **Thurmond**. You have been through a very scrutinizing examination this morning. The able Chairman here has certainly questioned you in every way possible, but I think you have answered your questions sincerely and honestly. You made decisions as you thought was right for the country and right in your heart and that is all anybody can do.

I congratulate you and I feel sure that he and I both will work hard to get you confirmed.

Mr. **Rule**. Thank you, Senator.

Senator **Metzenbaum**. Thank you. The hearing is adjourned.

[Whereupon, at 11:45 a.m., the committee adjourned subject to the call of the Chair.]

[The following material was subsequently supplied for the record:]

ANSWER OF CHARLES F. RULE TO WRITTEN QUESTION FROM SENATOR DECONCINI

Question. You indicated during the May 13, 1987 hearing while we were discussing the *United States* v. *Terminal Railroad Company* case, that if a railroad or a group of railroads monopolize an essential facility, thereby eliminating competition in violation of Section 2 of the Sherman Act, you would feel constrained to do nothing because of the existence of the ICC. Is that a fair assessment of your testimony?

Answer. No. If a railroad of group of railroads engaged in conduct that violates Section 2 of the Sherman Act, then the United States Department of Justice could and would, under appropriate circumstances, bring an enforcement action. I intended to point out in my testimony, however, that because the ICC has broader powers than the Department to deal with problems in the railroad industry, it is likely that the Commission would address the problem, thus obviating the need for an enforcement action by us. Indeed, the ICC, unlike the Department of Justice, can take action to deal with economic problems created by railroads, even though the problems do not rise to the level of an antitrust violation.

BIOGRAPHY

Charles Frederick "Rick" Rule

Born:	April 28, 1955	Nashville, Tenn.
Legal Residence:	Washington, D.C.	
Marital Status:	Married	Ellen Friedland Rule
Education:	1974-1978	Vanderbilt University Bachelor of Arts
	1978-1981	University of Chicago Law School Juris Doctorate degree
Bar:	1983	D.C. Bar Court of Appeals
Military Service:		none
Experience:	1980	Vinson & Elkins Summer Associate
	1980-1981	Mayer, Brown & Platt Law Clerk
	1981	Covington & Burling Summer Associate
	1981-1982	Chief Judge Daniel Friedman,(U.S. Court of Appeals for the Federal Circuit) Law Clerk
	1982-1984	Dept. of Justice, Antitrust Division; Special Assistant
	1984-1985	Dept. of Justice, Deputy Assistant Attorney General for Policy Planning and Legislation to Assistant Attorney General
	1985	Dept. of Justice, Acting Assistant Attorney General
	1985-1986	Dept. of Justice Antitrust Division
		Deputy Assistant Attorney General for Regulatory Affairs
	Present	Department of Justice Antitrust Division, Acting Assistant Attorney General

Office:

Department of Justice
10th & Constitution Ave., N.W.
Room 3107
Washington, D.C. 20530
202-633-2804

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full Name (include any former names used).

   Charles Frederick Rule - Rick

2. Address: List current place of residence and office address(es).

   Residence: 1911 New Hampshire Avenue, N.W.,
   Washington, D.C. 20009

   Office: Department of Justice
   10th & Constitution Avenue, N.W.
   Room 3107
   Washington, D.C. 20530

3. Date and place of birth.

   April 28, 1955; Nashville, Tenn.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   Ellen Friedland Rule; sales associate with Dale Denton Real Estate, Inc., 5039 Connecticut Ave., N.W., Washington, D.C. 20008.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates decrees were granted.

   University of Chicago Law School, Chicago, Illinois; October 1978 to June 1981; Juris Doctorate degree, June 1981.

   Vanderbilt University, Nashville, Tennessee; September 1974 to May 1978; Bachelor of Arts degree, May 1978.

6. Employment Record: List (by year) all business or professional corporations, companies, firms or other enterprises, partnerships, institutions and organizations, nonprofit and otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1976-1978	Mel's J&J Corner, Nashville, Tennessee; manager.
1979-1980	Lexecon, Inc., Chicago, Illinois; research assistant.
1980	Vinson & Elkins, Houston, Texas; summer associate.
1980-1981	Mayer, Brown & Platt, Chicago, Illinois; law clerk.
1981	Covington & Burling, Washington, D.C.; summer associate.
1981-1982	Chief Judge Daniel Friedman, U.S. Court of Claims (now the Court of Appeals for the Federal Circuit), Washington, D.C.; law clerk.
1982-1984	Department of Justice, Antitrust Division; special assistant to Assistant Attorney General William F. Baxter.
1984-1985	Department of Justice, Antitrust Division; Deputy Assistant Attorney General for Policy Planning and Legislation to Assistant Attorney General J. Paul McGrath.
1985	Department of Justice, Antitrust Division; Acting Assistant Attorney General.

1985-1986	Department of Justice, Antitrust Division; Deputy Assistant Attorney General for Regulatory Affairs to Assistant Attorney General Douglas H. Ginsburg.
1986-1987	Department of Justice, Antitrust Division; Acting Assistant Attorney General.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

   No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

   Phi Eta Sigma, Phi Beta Kappa.

9. Bar Associations: List all bar associations, any legal or judicial-related committees or conferences, of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   Bar of D.C. Court of Appeals, 1983.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong, including civic, educational, and "public interest" law, which you feel should be considered in connection with your nomination.

    None.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

    D.C. Court of Appeals, 1983; U.S. Court of Appeals for the Tenth Circuit, 1985.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written. You may also list any significant speeches which you feel may be of interest to the Committee.

    10/19/83--National Foreign Trade Council Foundation, Washington, D.C.

    Private Enterprise Policy and the National Productivity and Innovation Act

    5/1/84-- Cookware Manufacturers Association, Washington, D.C.

    Merger Policy, Protectionism and the Steel Industry

    10/25/84--National Association of Home Builders, Washington, D.C.

    Municipal Liability Under the Antitrust Laws: Where We Are and Where We Must Go

    2/22/85-- John Marshall Law School, Chicago, Illinois

    Technology Licensing and the Second American Revolution: Storming the Ramparts of Antitrust and Misuse

    5/23/85-- Federal Bar Association and the American Bar Association, Washington, D.C.

Antitrust Analysis of Joint Ventures in the Banking Industry: Evaluating Shared ATMs

5/24/85-- Annual Convention of Advanced Issues in Mergers and Acquisitions, Ryebrook, N.Y.

Modern Myths About Mergers

10/21/85--Chemical Manufacturers Association, Washington, D.C.

The Antitrust Division's Approach to Shippers' Association

11/8/85-- 19th New England Antitrust Conference: "Antitrust at the Crossroads?", Harvard University Law School, Cambridge, Mass.

Deregulating Antitrust: The Quiet Revolution

11/15/85--Antitrust Section National Institute on Joint Ventures, New York City, N.Y.

Joint Ventures from the Perspective of the Administration (Published in Antitrust Law Journal, Vol. 54, Issue 3)

8/12/86-- Antitrust Section, ABA, New York City, N.Y.

The Administration's Views: ATR Analysis after the Nine No-No's (Published in ATR Law Journal, Vol. 55, Issue 2)

10/16/86--Fordham Corporate Law Institute, New York City, N.Y.

Antitrust Guide for International Operations: A Progress Report (To be published)

10/21/86--Legal Conference Sponsored by the World Trade Association and the Cincinnati Patent Law Association, Cincinnati, Ohio

The Antitrust Implications of International Licensing: Analyzing Patent and Know-How Licenses

4/3/87-- Antitrust Section, ABA, Washington, D.C.

Official Report from Washington
(To be published in Antitrust Law Journal)

13. Health: What is the present state of your health? When was your last physicial examination?

Excellent. Autumn 1986.

14. Public Office: State (chronologically) any public offices other than judicial offices you have held, including terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None, except for the positions with the Department of Justice listed above in No. 6.

15. Business or other occupation:

    a. Have you ever been engaged in any business or profession other than the practice of law or holding of judicial or other public office? If so, give details, including dates.

       No.

    b. Are you now an officer, director, or otherwise engaged in the management of any business enterprise? If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

       No.

16. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	5	000	00
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	180	000	00
Real estate mortgages receivable			
Autos and other personal property (spouse)	4	000	00
Cash value—life insurance			
Other assets—itemize:			
IRA	3	300	00
Government Pension	11	000	00
Total assets	203	300	00

LIABILITIES				
Notes payable to banks—secured	3	000	00	
Notes payable to banks—unsecured	3	700	00	
Notes payable to relatives	13	500	00	
Notes payable to others	12	000	00	(school loan)
Accounts and bills due				
Unpaid income tax				
Other unpaid tax and interest				
Real estate mortgages payable—add schedule	144	000	00	
Chattel mortgages and other liens payable				
Other debts—itemize:				
Total liabilities	176	200	00	
Net worth	27	100	00	
Total liabilities and net worth	203	300	00	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.) Yes.			
Are you defendant in any suits or legal actions? No.			
Have you ever taken bankruptcy? No.			

*The numbers used in this statement are approximations.

Schedule - Real Estate Owned

Residence: New Hampshire Avenue, N.W.
Washington, D.C. 20009

Schedule - Assets Pledged

Residence mortgaged: New Hampshire Ave., N.W.
Washington, D.C. 20009

Auto pledged on a secured note.

CONFIRMATION HEARING ON: ROBERT HOLMES BELL, PHILIP M. PRO, ROBERT F. KELLY, AND JAMES T. TURNER

WEDNESDAY, JUNE 3, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:02 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy presiding.

Also present: Senators Thurmond and Specter.

Staff present: Steven J. Metalitz, special counsel; Robert J. Short, minority chief investigator; Stephanie Hamlett, nominations clerk.

OPENING STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. The Judiciary Committee will come to order.

We have a number of nominees here. We also have a number of very distinguished Members of Congress who are here, too, and I know each Member of the Congress has votes in committees and other duties and I am going to recognize them first to speak.

Senator Specter is a member of this committee, and by tradition will be recognized first. I understand, Senator Specter, that you are here on behalf of Judge Kelly, a nominee to be U.S. District Judge for the Eastern District of Pennsylvania, and then I will recognize Senator Riegle and Congressmen Carr and Henry, Senator Hecht and Senator Reid.

Senator Specter, go ahead.

Senator SPECTER. Thank you very much, Mr. Chairman.

Thank you, Senator Leahy, for allowing me to go first. I appreciate that. All of us have very crowded schedules and I have a commitment at 2:15, so I appreciate—really at 2:00 o'clock, so I appreciate this opportunity.

I want to present to the committee a very distinguished Pennsylvanian who is being considered for confirmation for the United States District Court for the Eastern District of Pennsylvania. The person to whom I refer is the Honorable Robert F. Kelly, who currently serves as a Judge of the Court of Common Pleas of Delaware County.

Judge Kelly is a man who I have known for more than a decade. He has an outstanding record. He has a bachelor's degree from Villanova University, he has a law degree from Temple University. He had served as law clerk to the presiding Judge of the court, Francis Catania, and then joined him on the Common Pleas bench of Delaware County.

He currently serves as a lecturer in law at Villanova University Law School. Delaware County is a large, highly populated county in the suburbs of Philadelphia. It has a very complex litigation pattern, and Judge Kelly has served with great distinction on that court now for more than 10 years.

He is preeminently well-qualified to serve on the Federal bench. And I want to thank the chairman of the committee, Senator Biden, who is not here. Senator Leahy, you have the responsibility for passing on the Federal judgeships. Thank you for the very prompt attention which has been given to Judge Kelly's nomination.

I think it is very important that prompt attention be given to the nominees, as this committee has, and I have urged the Department of Justice to expedite the processing of many judges where there are vacancies across the country and many in the Commonwealth of Pennsylvania. But when this committee receives a nomination in May and has a hearing on June 3, that is really extraordinary timing.

I see my colleague from Pennsylvania has arrived and no others are present, so I will be brief. I think really that Judge Kelly's record speaks for itself, but even when that is a fact we Senators have a tendency to speak in addition to that.

Thank you very much, Mr. Chairman, and I think you will find Judge Kelly well qualified and I urge his confirmation.

Senator **Leahy**. I thank you, Senator Specter. I appreciate your kind comments about expediting these matters. We are trying to, and in fact as of the end of today we will have had several more nomination hearings at this point than at a comparable point in the 1st Session of the 99th Congress, and that was a rapid pace then, so we are just trying to get better every year.

Senator Heinz.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator **Heinz**. Mr. Chairman, I too commend you for holding these hearings so expeditiously. It is a pleasure for me to join with my colleague from Pennsylvania, Arlen Specter, in introducing to you and to the committee Judge Robert Kelly.

I am very proud to have the opportunity to introduce Judge Kelly. He is, of course, the President's nominee to fill the vacancy on the U.S. District Court for the Eastern District of Pennsylvania. He is a product, most importantly, of the Federal Judicial Nominating Commission of Pennsylvania, a Commission that Senator Specter and I established in early 1981, and which had been previously established by Senator Schweiker and myself in only a slightly different form in 1977. The fact that the Commission produces nominees of the highest possible quality is proved by the fact that Bob Kelly is here with us today. His career is one of outstanding achievements and extremely dedicated public service.

As you may know, he has been a member of the Court of Common Pleas of Delaware County since 1976, and prior to that he served for four years as a prothonotary in Delaware County. He also served part-time as a law clerk for Common Pleas Court Judge Francis Catania for 9 years while maintaining a private practice.

He has an outstanding record of legal opinions, both in criminal and civil cases with Judge Kelly developing a specialty in trial practice and in the field of evidence. The strength, fairness, compassion, and knowledge that he developed in his private practice, and then translated in his service on the bench has prepared him well for the responsibilities for which the President has nominated him.

You might be interested to know that when the Delaware County Daily Times, learned of the President's nomination, it named him person of the week, and said of Bob Kelly, "He'll give citizens someone to admire, and criminals someone to loathe."

I think Bob Kelly will be a tough but fair judge. He is a man with great concern for the young people of his community. A less known fact is that for the past 8 years, in spite of the fact that he has been serving as administrative judge, and presiding over a record number of cases, he has taken time out of his duties to lecture to students on law at one of the area universities.

To give you some idea of his schedule, while he has been serving as administrative judge, he has nonetheless presided over a staggering 55 jury trials in the course of one year and a total of 150 jury trials in his 3½ years as Chief Judge of the Criminal Court. I think we can all be extremely confident of Judge Kelly's ability to serve with distinction as a member of the Federal judiciary.

But before I complete my remarks, I would like to take up Mr. Chairman, where Senator Specter began, and that is on the subject of court vacancies in the United States and in the Commonwealth of Pennsylvania. If my information is correct, there are currently 65 Federal court vacancies in the United States, and 8 of them are important vacancies in Pennsylvania.

With the support of the Senate for Judge Kelly, we can reduce the number in our State to seven. But the fact remains that there is a large number of current vacancies in our State and elsewhere and it poses a significant problem for the Federal courts.

Judges are laboring under staggering workloads, senior judges are forced to continue handling practically full-time caseloads, and citizens who depend on timely administration of justice are being harmed. Justice delayed is Justice denied.

Mr. Chairman, it gives me no pleasure to say this, but from personal experience I can tell you that most, if not all, of the blame lies with the Justice Department. They have been slow, they have been cumbersome, they have been unresponsive, and they have been behind the eight-ball.

Judge Kelly is a case in point. Senator Specter and I sent Judge Kelly's name to the Justice Department on June 5, 1986. Well, Bob, you made it within a year through the bureaucracy at the Justice Department.

In the Western District of Pennsylvania we have 3 vacancies that are already more than 2 years old and we also have 3 additional vacancies that have occurred more recently in the Eastern District as well.

The critical backlog of cases—and there is one—is becoming a significant problem. In spite of herculean efforts by our courts and by our judges in Pennsylvania and elsewhere, the courts are simply not equipped to operate with significantly less manpower than the system demands.

I would close by observing that with the 1988 elections more or less a year away, we must move on these important judicial posts before the committee becomes preoccupied with other concerns. And as we all know, there is a tendency for the Judiciary Committee, as we get into a Presidential election year, to slow down for other reasons.

I want to see the Department of Justice clean up its act and move forward on the pending judicial vacancies not only in Pennsylvania but elsewhere. I hope that to the extent the Justice Department is present and listening, they will receive this message.

I have met with the Attorney General, so has Senator Specter. I have corresponded, I have talked, and I have met with many other people in the Justice Department. They have, to say the least, been slow to the point of irresponsibility. I have tried to keep this in private so far, but frankly I just felt that today was about the last straw, as Bob Kelly comes up in what would have been the first year anniversary of his name having been sent to the Justice Department.

Mr. Chairman, I thank you for indulging me. I appreciate your time.

Senator **Leahy**. Thank you very much. I know that both you and Senator Specter have a busy schedule and we excuse you. Judge Kelly, we are going to try to get to him before we recess at 3 this afternoon so that we can get him in here. And I appreciate what you say, because 7 of the 42 vacancies awaiting nomination, 7 of those are from the Commonwealth of Pennsylvania.

I have tried to demonstrate that this committee, however, is ready to move quickly. As you know, Judge Kelly's name came here less than a month ago and we will try to continue to move things through as quickly as we can here. We can only have the hearings after we get the names. And I appreciate both you and Senator Specter——

Senator **Heinz**. Mr. Chairman, you and your committee have been spectacular.

Senator **Leahy**. Thank you.

Senator **Heinz**. I wish the Justice Department was even half as good.

Senator **Leahy**. I have passed similar views on to them and I am glad you expressed them here.

Judge, if you could excuse us for a few minutes, I want to hear now from the senior Senator from Michigan, my good friend, Don Riegle, Representative Bob Carr, who is here with him. I see sitting here Representative Paul Henry.

I heard beepers going off. I do not know——

Senator **Riegle**. Yes, Mr. Chairman, if we could, it would be of great help if I might defer to my two House colleagues, first to Congressman Carr and then to Congressman Henry, so that they may make brief comments and then make this vote on the House side.

Senator LEAHY. We are honored to have both Bob and Paul here today, I am delighted to have you over here.

STATEMENT OF HON. BOB CARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CARR. Thank you, Senator. Particularly, it is our honor because of the courtesies involved.

I am going to be brief. I am going to leave it to Senator Riegle to carry the major load here, but I want to say that I have known this fine man, Rob Bell, for 15 years. We have been in public service together in Ingham County, Michigan, and I do not think I need to tell you that lawyers will talk about what kind of judges we have. They will get around a coffee shop or a local pub and they will grouse about who is a good judge and who is not. And in 15 years of those kinds of conversations, I can honestly say I have never heard one single solitary negative thing about this judge. He has carried himself with the kind of example that all community leaders should.

He is going to be a fine Federal judge. He is a leader in his community, a leader in his church, he is a leader certainly with his family, and they are all here to support and Senator Riegle will introduce them.

I merely want to be here in the most forceful way I can to urge speedy confirmation of Judge Rob Bell.

Thank you.

Senator LEAHY. Thank you very much, Congressman.

Congressman Henry.

STATEMENT OF HON. PAUL HENRY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. HENRY. Thank you, Mr. Chairman. I thank my Senator for his courtesy.

Let me simply say that if the criteria of the committee is seeking a judge with keen intellectual ability, legal acumen and absolute moral and ethical integrity, I do not know who I could suggest to you who meets these criteria more wholly than Mr. Bell.

I was actively involved in the effort of getting quite frankly a unusual bipartisan process, given the circumstances, to make recommendations to the White House.

Mr. Bell was the first choice of this committee. His name has been before the public in the entire Western District for over a year, and in that period we have received not one reservation or objection. I would not make such a strong statement were it not defensible, otherwise I would be hurting the candidate whom I come to commend to you.

I thank you for this courtesy.

Senator LEAHY. Thank you very much.

Gentlemen, you have a vote, so please take off.

Mr. CARR. Thank you, Senator.

Senator LEAHY. I know what that is like. Thank you both for coming over here.

Mr. HENRY. Thank you, Senator.

Senator Leahy. I turn to my good friend, Senator Riegle, one of the closest friends I have in the U.S. Senate. I want you to know, Judge Bell if you could not make it on your own merits, you would make it on the merits of having people like this speaking for you.

Go ahead, Senator Riegle.

STATEMENT OF HON. DONALD W. RIEGLE, JR., A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator Riegle. Thank you, Chairman Leahy. It is a pleasure to appear before you here today, and I think the bipartisan statements that you have just heard from Congressman Carr and Congressman Henry are an illustration of the broad feeling of support that exists behind this nominee, Judge Bell.

I want to thank you for the opportunity to introduce him to the committee today. He comes before us as a nominee to fill a vacancy on the U.S. District Court in Michigan's Western District.

He does have with him his wife, Helen, his daughter, Ruth, and his son, Rob, Jr. They have a 4-year-old that is home rooting for Michigan, and so it is very nice that his family can accompany him today, and I wanted to acknowledge their presence.

Judge Bell was born and raised in Lansing, Michigan. He received his bachelor's degree from Wheaton College, in Illinois, and his law degree from Wayne State University. He has been an active member of the legal community in our State for 18 years.

His career has included experience in the prosecutor's office in Ingham County and in private practice. Upon leaving the prosecutor's office in 1972, Judge Bell was elected to the District Court bench and subsequently was selected as a Circuit Court judge for Michigan's 30th Judicial Circuit Court, and he has held the position of Circuit Judge since 1979.

In his position as a Circuit Judge, Judge Bell has demonstrated the highest integrity and is considered to be well qualified by his colleagues in Michigan. He has conducted his court with dignity and professional objectivity.

It is clear, I think, by all measurements that Judge Rob Bell has the experience, judgment and sense of fair play that one looks for in a candidate for a Federal judge.

I would just say two things in conclusion: I had the privilege of nominating the three sitting judges who now make up the Western District bench in Michigan, and I think they are fine judges and I think that this will be a worthy addition to that group.

I want to also commend Congressman Henry for his efforts, to reestablish a screening panel process which I had used during the time that our party controlled that process in Michigan. It was through this very careful screening process that Judge Bell has emerged as a candidate in open competition, and I think that is the way we ought to find the most distinguished prospective jurists, and it was done importantly in this case with the leadership of Congressman Henry, which ought to be acknowledged.

So I would hope that the committee could act as promptly as it can, because I think we have here a fine candidate and his services are needed and will be much appreciated on the bench.

I thank the committee.

Senator **Leahy**. Thank you very much, Senator Riegle.

Thank you, Judge Bell, for being here.

I know you have also got assignments in other areas.

Senator **Thurmond**. I want to congratulate the nominee on being appointed and also thank you, Senator Riegle, for coming over and testifying in his behalf.

You know him personally, do you?

Senator **Riegle**. Well, I do now. Mr. Chairman, I have known him by reputation for many years.

Senator **Thurmond**. You know him by reputation and you recommend him?

Senator **Riegle**. I do indeed.

Senator **Thurmond**. Well, that is sufficient for me. Thank you very much. We are delighted to have him.

Senator **Leahy**. We have the distinguished Senators from Nevada here, Senator Hecht and Senator Reid, who are here to speak on behalf of Judge Pro, who has been nominated for U.S. District Judge for the District of Nevada.

Senator Hecht, if you would like to start, and then we will recognize Senator Reid.

STATEMENT OF HON. CHIC HECHT, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator **Hecht**. Thank you, Mr. Chairman, Senator Thurmond.

I am delighted to have the honor of introducing Phil Pro to this committee. He is one of the most respected members of the legal community in Nevada. He is recognized by most people as a tough but a fair judge.

Mr. Chairman, as you are aware, this vacancy is a result of the impeachment last year of Judge Harry Claiborne. With this in mind, I deliberately set out to find a man whose reputation for honesty and integrity is beyond question.

I know my Senate colleagues will want to make absolutely certain that a qualified and honorable judge is chosen. I am confident that Phil Pro is the right man for the job.

Phil's legal background include both the public and private sectors, and his training ground, experience in the U.S. Magistrates Court will be invaluable both in civil and criminal matters.

He is a native of Richmond, California. He earned his juris doctorate degree at Golden Gate University, in San Francisco, in 1972, following a B.A. in political science in 1968 at San Francisco State.

He served as a law clerk, Deputy public Defender and Assistant United States Attorney in Las Vegas between November 1972 and January 1978, and was engaged in private practice in Reno during the following 2 years.

Later, he worked as a Deputy Attorney General and Chief Assistant U.S. Attorney. From October 1980 to the present, he has served as a U.S. Magistrate.

Phil Pro has been very active in legal affairs and has served as a lecturer at numerous continuing legal education seminars. He has been Chairman since 1976 of the State Bar of Nevada's Annual Roger T. Foley Law Day Essay Contest. He has served in various capacities with the National Conferences of Christians and Jews.

He is a member of the State of Nevada's Commission on the Bicentennial of the U.S. Constitution. He and his wife Dori and daughter Brenda live in Las Vegas.

Senator Leahy, you and I both had the pleasure of serving the previous 2 years on the Intelligence Committee, so before I brought Phil Pro's name to you I did a little bit of intelligence on what we had worked on in the committee. I talked to the different attorneys in the State, in the county, Clark County. They said he is a lawyer's lawyer, you could not make a better choice.

I spoke to the judges, Federal judges. Although I definitely believe in separation of powers, I asked them, Phil Pro has worked with you, is there anything in his background in any way which would not make him the right man for a Federal judgeship. They said, Senator, since you asked us, without exception, you could not have made a better choice.

I went to the FBI and I said our State has recently had a black mark, please tell me in advance, is there anything possible. They said, Senator, there is no one in the State we can recommend more than Judge Pro.

I have an individual working in my office, a man by the name of Bill Cook, who is retired military. Because of his background in the military, he is an early riser and sometimes he is at my office at 5 o'clock in the morning. He has consistently said there are only two cars in the parking lot at 5 o'clock in the morning, my own car and Judge Pro. He is an absolute workaholic and he is the last to leave the Federal building at nighttime.

He is absolutely apolitical, never been engaged in politics in either party, and probably the only thing you might find derogatory is that he has been recommended by a conservative U.S. Senator.

I wanted to pick a man who would apply the law, not make the law. Mr. Chairman, I am pleased to recommend Phil Pro to fill the vacant seat of the U.S. District Court, and I urge this committee to move quickly to approve his nominations.

Thank you for this courtesy.

Senator Leahy. Thank you very much.

Incidentally, I would point out that all of the judges that have ever been proposed from my own State have always been proposed by conservative Senators.

Senator Reid.

STATEMENT OF HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator Reid. Mr. Chairman, Senator Thurmond, it is an honor and a privilege and really a pleasure for me to appear before you today to give you my thoughts about the nomination of Phil Pro to be a Federal Judge in the District of Nevada.

I have known Phil Pro for many years and in many different capacities. When I was Chairman of the Nevada Gaming Commission, Phil was my lawyer. He was tough, smart, and very hard working.

We used to joke about Phil Pro. We had a lot of problems at the time in the gaming industry, and we always said that Phil beat the best lawyers money could buy, and we really meant that. We had people who had a lot of money, they could pay a lot of money for lawyers, but Phil was able to hold his own and beat them in every case.

Judge Pro has sat now as a magistrate in Southern Nevada. He has developed, while sitting as a magistrate, a reputation as a judge who is fair-minded, willing to listen to both sides, who has read the parties' briefs, the law they cite, and who will render a decision which both sides will agree is based on sound legal reasoning and a dispassionate analysis.

I have seen Judge Pro in action on the bench prior to coming back to Congress. I was an attorney and appeared before my friend, Judge Pro. He is a model of decorum, common sense, and really friendly wisdom. He takes seriously his job as a seeker after the truth and as an expeditor of justice. His efforts have certainly improved the quality of practice in the courts in Nevada.

The qualities which I have described, hard work, intelligence and judicial demeanor, are what makes a good judge, I think we would all agree. If they were the only reasons for my support for Phil Pro, they of course would be more than sufficient, but there are other reasons and I will talk about one of those reasons now.

Every lawyer worth his or her salt, whether a practicing attorney, a judge or an administrator, owes a debt to his community which he can repay through public service. Phil Pro has gone above and beyond the call of duty in that regard.

His work with the National Conference of Christians and Jews, which Senator Hecht alluded to, is only one of the civic and charitable endeavors that he has been involved in, but it has been nothing short of outstanding.

He has guided, nurtured the issues in justice forums in Southern Nevada, forums which have educated and enlightened the public about key issues of the day. Judge Pro is too modest to discuss it, but I know that his hard work and intense concentration and creativity night after night—and I am sure he spent some of those early morning hours on some of his charitable activities, which is commendable—he has done it not for a day here and there but for really weeks on end, and he has been responsible for raising the funds which have kept the Conference of Christians and Jews functioning in Southern Nevada.

Mr. Chairman, I take great pride in supporting this nomination, and I would like to take this opportunity to commend my colleague, Senator Hecht. It is no secret, he and I do not vote the same all the time, but I told—Senator Hecht called me when he had decided on, at least I should say he was getting very close and perhaps had already decided on nominating Phil Pro. He asked me what I thought and I told him that I do not know of anyone that he could nominate who would be better qualified to represent not only the State of Nevada but this country on the Federal bench, and so, Senator Hecht, I compliment and congratulate you for this outstanding nomination and ask this committee's immediate confirmation and sending it to the Senate floor.

Thank you.

Senator LEAHY. Thank you very much. I especially appreciate the statement, Senator Reid and Senator Hecht, because while every judgeship has to be looked at on the basis of the qualities of the individual nominee and the needs of the particular district, it would be impossible for any of us to overlook why there is a vacancy in this judgeship. The first Federal judge impeached and convicted on an impeachment trial in half a century was the former judge for the district, Judge Claiborne, and while in some way it is not completely fair to even bring that up in the nomination hearing for Judge Pro, it is impossible to ignore that historic fact. And because of that I think all the more of the duty upon both of you gentlemen to nominate and ask the President to nominate somebody of the highest qualifications.

It is not a case where second choice can do, so I appreciate very much the statement you made. As I say, it is impossible for anybody, whether in Nevada or here in the Senate Judiciary Committee, to ignore the circumstances of this vacancy.

I yield to my good friend and far more distinguished Senator, Senator Thurmond.

Senator THURMOND. You are very flattering.

Senator LEAHY. I will bring the syrup tomorrow.

Senator THURMOND. Judge, I just want to congratulate you.

Judge PRO. Thank you, Senator.

Senator THURMOND. Senator Hecht here, whom I presumed recommended you to start with, is held in very high esteem in the Senate. Senator Reid, a new Senator here, is also held in great respect. You have got the recommendation of both of these Senators and that means a lot. I do not think you will have any trouble.

Thank you very much.

Judge PRO. Thank you very much, sir.

Senator LEAHY. Thank you very much.

The last person we will hear from prior to hearing from the nominees themselves is Senator Trible, from Virginia, who has been waiting here patiently. Paul, we appreciate you being here, and I understand you are here with Judge Turner, who is nominated to be a judge of the U.S. Claims Court.

STATEMENT OF HON. PAUL S. TRIBLE, JR., A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator TRIBLE. Thank you, Mr. Chairman and Senator Thurmond. Thank you for the opportunity to present Jim Turner today. I do so on behalf of my senior colleague, John Warner and myself.

Judge Turner will bring to the U.S. Claims Court a wealth of knowledge, experience, proven judicial temperament, and a deep appreciation of values of our American legal system.

Judge Turner obtained, Mr. Chairman, his undergraduate degree at Wake Forest and his law degree from the University of Virginia. He has had a long and distinguished career as a trial lawyer and, very importantly, for the last 8 years he has served ably as U.S. Magistrate in Virginia's Eastern District.

Judge Turner is eminently qualified. He will make a worthy addition to the U.S. Claims Court. On behalf of Senator Warner and myself, we urge you to review his qualifications and then act promptly.

Mr. Chairman, John Warner is in the Persian Gulf and so on behalf of my friend and colleague, I would offer at this time a statement and ask that it be made a part of the record where he, too, speaks of the outstanding qualifications of Judge Turner and encourages you and your colleagues to act promptly and favorably.

Senator LEAHY. It will be made part of the record. The Chair would note that Senator Warner and Senator Glenn, at the request of the Senate leadership, are in the Persian Gulf to inquire into the *Stark* matter. I might also just add, as a personal aside, I cannot think of two Senators better qualified to do that.

[The statement of Senator Warner follows:]

PREPARED STATEMENT OF SENATOR JOHN WARNER

Mr. Chairman, members of the Committee, it is my pleasure to be here today to introduce to the Committee The Honorable James T. Turner as the nominee for a judgeship in the United States Claims Court.

Judge Turner is presently a United States Magistrate at the United States District Court for the Eastern District of Virginia at Norfolk, where he has presided since 1979. Judge Turner left the Norfolk law firm of Williams, Worrell, Kelly & Greer to take his position on the bench.

Judge Turner is a native Virginian, originally from Clifton Forge, Virginia, and presently a resident of Norfolk, Virginia, where he has lived since 1965. Judge Turner received his undergraduate degree in English from Wake Forest College, in Winston-Salem, North Carolina. While at Wake Forest, Judge Turner was inducted into the national leadership fraternity, Omicron Delta Kappa. Judge Turner returned to the Commonwealth to attend law school at the University of Virginia, where he received an LLB in 1965.

From 1960 to 1962, Judge Turner served in the U.S. Army at Fort Benning, Fort Holabird, and Fort Bragg as an intelligence officer. Judge Turner attained the rank of captain prior to his honorable discharge in 1962.

While in private practice, Judge Turner distinguished himself as a trial attorney in business, employee benefits and insurance defense litigation. Judge Turner's committment to equal justice is further evidenced by his record of pro bono representation, volunteer service as counsel in a legal clinic, and representation of disadvantaged persons for reduced fees.

Throughout his career, Judge Turner has earned the respect of his colleagues in the legal profession as an able litigator and an intelligent, capable federal magistrate. I am entirely confident that he possesses the character and temperament necessary to carry out his duties in the U.S. Claims Court with great distinction.

I look forward to Judge Turner's contributions to the federal judiciary as he continues his career in the U.S. Claims Court.

Senator LEAHY. Senator Thurmond.

Senator THURMOND. Judge Turner, congratulations on your appointment.

Judge TURNER. Thank you very much.

Senator THURMOND. You are endorsed by both of your Senators. Senator Warner is away at this time, but I am very pleased that you have the able Senator, Paul Trible, who is I consider, if you want to have a man called "Mr. Integrity" in the Senate, I think that would be a good designation for him. He is held in high esteem by all of us. I do not think you will have any trouble being confirmed.

Thank you very much.

Judge TURNER. Thank you.

Senator LEAHY. I should also express my appreciation to Senator Trible, too, because I know that he has been heavily engaged in the on-going Iran matter, and I do appreciate your taking the time to come over here, and I know you have to go back.

Senator **Trible**. I just returned. The hearings started once again, Mr. Chairman. I thank you for your kind words and those of Senator Thurmond.

Senator **Leahy**. Thank you.

I wonder if Judge Bell, Judge Pro, Judge Kelly, and Judge Turner would please all four stand and raise your right hands. Do you solemnly swear that the testimony you shall give in this proceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Bell**. I do.

Judge **Pro**. I do.

Judge **Kelly**. I do.

Judge **Turner**. I do.

Senator **Leahy**. Let the record show that all four were sworn.

Judge Bell, if you would come forward, please.

My formal statement will be placed as part of the record, as always. Of course, the normal material requested by the committee is made a part of the record and is available to other members of the committee or the public, as they see fit.

[Prepared statement follows:]

OPENING STATEMENT OF SENATOR PATRICK LEAHY

This afternoon, the Judiciary Committee holds its sixth hearing in this Congress to consider nominations to the federal courts.

This afternoon, we will take testimony on four nominations. Three nominees have been proposed for various District Courts: Judge Robert Holmes Bell, for the Western District of Michigan; U. S. Magistrate Philip M. Pro, for the District of Nevada; and Judge Robert F. Kelly, for the Eastern District of Pennsylvania. The fourth nominee, U. S. Magistrate James T. Turner of Virginia, has been nominated to the U. S. Claims Court.

As we customarily do, we will hear first from Senators who wish to introduce nominees to the Committee. Before we turn to the Senators, let me note for the record that each nominee before the Committee today has completed an extensive questionnaire on his qualifications, experience, and financial situation. The publicly available portions of these questionnaire responses will be printed in the record of this hearing. We will also keep the record open for a limited time for follow-up questions to the nominees, and for additional questions that may be submitted by members of the Committee who are unable to be present this afternoon. Finally, we will include in the record the full introductory statements of home-state Senators.

Judge Bell, the statements made by the two distinguished members of the House of Representatives and my distinguished Senate colleague speak of your lengthy and distinguished tenure as a Judge of the State Courts in Michigan, and certainly they were unrestrained in their praise of you.

But your experience has been in the State courts, not in the Federal courts either as a lawyer or as a judge. I am sure you have given thought to making that transition. What do you see as the difficulties in making the transition? How do you anticipate going about making that transition?

TESTIMONY OF HON. ROBERT H. BELL, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MICHIGAN

Judge BELL. Michigan has adopted the civil rules of procedure almost verbatim from the Federal rules and the same with the rules of evidence. As a matter of fact the Federal commentary has become authoritative in matters of procedure in Michigan. I find myself quite familiar with them.

There are other matters which I will have to learn and I am learning and am consulting with various publications that I have already received. I work heavily in civil and criminal cases and I think there is a good carryover from the State to the Federal substantively.

Senator LEAHY. Judge Bell, I understand you have members of your family here today. Would you introduce the members of your family and ask them to just stand a moment.

Judge BELL. Yes. My wife, Helen, is here, and my son, Rob, Jr., and my daughter, Ruth, and then our 4-year-old, Jonathan is at home but very much with us in spirit.

Senator LEAHY. I appreciate all of you being here. I know that it must be a proud day for the three of you.

You mentioned your 4-year-old. If Senator Thurmond would forgive me, I was a proud father when I first came here and our youngest was 4 years old and he enjoyed running up and down the halls of this place. We have little subway cars that go between the buildings and the Capitol and the subway operators kind of watch the children and they put them up in their lap and let them ring the bell on the car and open the doors back and forth, which my son thought was great.

One of the local newspapers came to interview the family, what it was like to be down here, and came to him and said, "What do you think of your father's job?" He said, "Oh, it is a very important job." They said, "Oh, why is that?" He said, "Well, he has an office in one building but he really works in the other building, and to go there is a little subway train and I get allowed to ride in that and to ring the bell, which is a very important job." They always put it in perspective and I have often thought on days when I am here that that is probably the most important thing I have been able to accomplish in the 13 years.

Judge Bell, you are a member of the Rotary Club in Mason, Michigan, up to the present. I understand this Rotary Club has denied admission to women, is that correct?

Judge **Bell**. The first part of last month they will permit women to join and I believe I sent a letter in from the President indicating that as of the 1st of May there had been a letter indicating that women are now able to join.

[Letter follows:]

ROTARY CLUB OF MASON

May 28, 1987

TO WHOM IT MAY CONCERN:

This is to advise that the Rotary Club of Mason, Mason, Michigan, at its regular Board of Directors meeting on May 12, 1987, unanimously voted in favor of the admission of women to the organization on the same terms and conditions as male members are admitted.

While to date, no women have been admitted, it is my belief that women will be invited to join the club within the near future.

Our Club is a new club (less than two years old) and it needs new members. Accordingly, it was the unanimous feeling of the Board that the decision to admit women as members provides an excellent opportunity to immediately strengthen our membership roster.

Sincerely yours,

Benjamin O. Schwendener, Jr.
President, Rotary Club of Mason

BOS:sm

109½ EAST MAPLE, MASON, MICHIGAN (571) 676-0060

Senator **Leahy**. In fact, have you not--if you will forgive a leading question—have you not long advocated such admission of women?

Judge **Bell**. I have, and the younger members of that club have for some time.

Senator **Leahy**. Now, you have also been an active member of the Christian Legal Society and participated in the Christian Conciliation Service in Michigan.

Judge **Bell**. Yes.

Senator **Leahy**. What has been your principal activity in these two organizations?

Judge **Bell**. Primarily attending conferences, meetings, where the various topics are raised, leading discussion in several of them, attempting to integrate one's faith with one's practice and one's standards that one has.

Senator **Leahy**. The last national convention of the Christian Legal Society, you gave a talk on "The Responsibilities of Christian Lawyers in Divorce Cases." What was the basic thrust of that?

Judge **Bell**. The basic thrust is that many people who adhere to Christian principles and call themselves Christian lawyers do not want to get involved in divorce because of the messiness and the dirt obviously which comes. Having worked in the divorce courts for many years, I strongly advocate Christians and any lawyers to become involved in that. I think that is a crucial leadership position which lawyers and judges can have in persons' lives and the reordering of lives as a result of divorce cases, and that is what I was advocating at that conference.

Senator **Leahy**. Judge, Federal judges, of course, come from all religious backgrounds or none, just as members of the Senate do, and obviously whatever your personal religious belief, you have got to give equal justice to all litigants who appear before you, no matter what their religion and those who have no religion, no matter what the case may be.

Judge **Bell**. Yes.

Senator **Leahy**. Do you feel any hesitation in your own mind of your ability to do that, to provide equal justice?

Judge **Bell**. None at all. In fact, in my almost 15 years as a State judge I have never been criticized for favoring a Christian or a non-Christian or making that an issue which took part in the adjudication of anything I did as a judge, and I do not believe it would. In fact, the respect with which I want people to accord me and my beliefs I will accord another person in their beliefs.

Senator **Leahy**. You are an adjunct professor at a law school in Lansing, Michigan. What do you teach there?

Judge **Bell**. I teach trial advocacy, brief writing, and the educational role that lawyers have in the judicial system and the adversarial system and then, more importantly, I teach a survey course in jurisprudence.

Senator **Leahy**. And will you continue that teaching?

Judge **Bell**. I hope to do that. I find it very stimulating, Senator.

Senator **Leahy**. Thank you.

Senator Thurmond.

Senator **Thurmond**. Thank you very much, Mr. Chairman.

Judge Bell, how does a responsible judge go about the process of interpreting such seemingly open-ended constitutional provisions as the due process or equal protection clauses?

Judge BELL. I think one studies very carefully under the principle stare decisis prior decisions which have been rendered where statues have been enacted which can give one some guidance, obviously carefully studying those statutes and the Congressional Record which may accompany them, to discern what was the intention, if it is a public policy question, what was the intention of the Legislative Branch; if it was a constitutional question, deciding what in fact was the intention of the drafters of the Constitution.

Senator THURMOND. Judge Bell, what is the proper application of stare decisis in constitutional law? Specifically, what is the duty of a Federal judge when confronted with a case in which one of the precedents of his court clearly conflicts with the Constitution as that judge interprets it?

Judge BELL. The dilemma is stare decisis versus unconstitutionality. It seems to me that the oath of office that I take, which is to uphold the Constitution and laws of the State of Michigan, would probably dictate that in final analysis—we are talking in a generic sense at this point—I would probably have to follow the proper circuit opinion or Supreme Court decision but in fact in an opinion indicate that there was a question that remained to be resolved at least in my own mind.

Senator THURMOND. In other words, as the Court acted you feel your duty to follow the High Court——

Judge Bell. Yes, but——

Senator THURMOND [continuing]. Then if someone tested that matter, they could test it and go to the High Court and that is where you feel it should be changed?

Judge BELL. Yes, but at the same time indicating perhaps in the opinion my own reservation.

Senator THURMOND. Thank you very much. I have no more questions. I hope you have a happy tenure of service on the bench.

Judge BELL. Thank you very much, Senator Thurmond.

Senator LEAHY. Judge Bell, the only other questions I have will be submitted for the record and if you could answer them as quickly as possible so we can get your nomination on the executive calendar.

Judge BELL. OK. Thank you very much.

Senator LEAHY. Thank you very much.

[The questions and answers referred to are contained in the files of the committee.]

Senator THURMOND. Mr. Chairman, I have an appointment I have to make and I just have a couple of questions for each of these nominees and would you mind propounding these questions for them?

I have looked into the backgrounds of all of these nominees and I think they are very well qualified and I would be glad to support them in the committee and on the floor, too. I think the President has made good appointments.

Thank you very much, Mr. Chairman.

Senator LEAHY. Thank you. Without objection, the questions of the distinguished senior Senator from South Carolina will be submitted for the record and, again, I would suggest to each of the remaining three nominees, when you get Senator Thurmond's questions, answer them quickly so we can go on with it.

Now we will go on with Judge Pro.

Judge Pro, do you have members of your family here?

TESTIMONY OF HON. PHILIP M. PRO, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE DISTRICT OF NEVADA

Judge PRO. Indeed, I do, Senator, and also some friends from Las Vegas.

Senator LEAHY. Please introduce them to us.

Judge PRO. My wife, Dori, and daughter, Brenda, are seated in the front row.

Senator LEAHY. How do you do?

Judge PRO. And also from Las Vegas, our good friends, Brian and Susan Buckley, Bob and Tami Huggins, and Cathy Sourk. We brought a good contingent of Nevadans with us.

Senator LEAHY. I was going to say, the population register decreased when you come to town, but I am delighted to have them here and I know how proud you must be today to be here.

I want to follow up just a little bit on what I said earlier. Nobody suggests we put on your shoulders the reordering of the whole Federal judiciary nor in any way suggest that somehow you must recompense for the behavior of your predecessor. But simply as a point that judges are in many ways like Caesar's wife. They must be above reproach. And it is that branch of government more than any other, because of the lifetime tenure, the enormous power and the prestige that rests in that, where people can look and say this is why our Government works, this is how it works, this is what we look to to say what is best, about our system.

So in your case, Judge, like it or not, you cannot be just a good judge, you have got to be an exemplary judge, and it is not a time for false modesty. Do you feel up to that kind of a challenge, because you know people are going to watch you?

Judge PRO. Setting aside modesty, yes, Senator, I do and your point is well taken. I am very mindful of the circumstances which led to the vacancy that I am now seeking to fill. I have always thought, while I have served as U.S. Magistrate, and indeed as a lawyer prior to that, that we have an obligation beyond just doing our jobs and doing them well and doing them fairly, but to project the image of fairness and honesty and integrity to the public that we serve. I try to do that as United States Magistrate and I will continue to try to do that if confirmed as United States District Judge. I know that there will be a microscope perhaps focusing on me, but maybe it is a good lesson for all judges.

Senator LEAHY. How long has it been now that that post has been empty, 3 years, 3½ years?

Judge PRO. About 3½ years, Senator.

Senator LEAHY. Has it got a heck of a backlog sitting there?

Judge PRO. There is quite a backlog and the judges that are currently sitting have been working very hard to keep up with that, and senior judges are working hard as well.

Senator **Leahy**. Then once you get—I would assume that once the Senate confirms you—and I have no doubt that they will do that—I assume that you would be ready to move very quickly in your duties?

Judge **Pro**. Yes, Senator, I would. We have already started the plans for the reassignment of cases, anticipating confirmation of either myself or some other successor and we will be ready to move.

Senator **Leahy**. You were involved in the MGM Hotel fire litigation, were you not?

Judge **Pro**. Yes, I was.

Senator **Leahy**. Tell me a little bit about that. I must admit that I have been fascinated at reading just what the press accounts have been about it.

Judge **Pro**. It was fascinating. We did not call it a case, we called it an experience. Of course it was a tremendous tragedy in Nevada and for the people whose lives were lost and injured, but it did give me a chance I think, working with Judge Lou Bechtel from the Eastern District of Pennsylvania, who was the District Judge assigned to the case, to develop and to hone my skills as a manager of complex litigation. I think I have learned lessons there that I can apply to other cases and that I have tried to apply to other cases that come before me, particularly the more complex civil litigation that we sometimes encounter.

Senator **Leahy**. A lot of pretrial, a lot of discovery.

Judge **Pro**. A tremendous amount of pretrial motion work. We had weekly discovery hearings at 7:30 each Wednesday morning. We conducted 140 of those.

Senator **Leahy**. So you are not going to have to learn too much about Federal procedure then?

Judge **Pro**. Well, I can always learn and there are always nuances that maybe I have not come across and I am always studying hard, but hopefully that has helped to train me or equip me for the new position.

Senator **Leahy**. One last question. What type of pro bono activity have you done?

Judge **Pro**. As a deputy public defender, of course, I served and represented indigent criminal defendants exclusively. Also in private practice I did take cases pro bono and off of the court-appointed panel. Most of my work otherwise has been in the area of public service and I really think in a true sense much of the work that I have done can be characterized as pro bono. Also, my activities outside the literal workings of the court, community activities. I speak at a prison in Southern Nevada each month to inmates who are about to be paroled and discuss with them certain changes in the law and things they should be aware of, and I consider those certainly to be pro bono activities. I think it is my obligation as a public servant to do something a little extra along that line and I try to do that.

Senator **Leahy**. I thank you very much. Senator Thurmond has questions for the record which we will give you and I hope you and your wife and friends will have a chance to do some sightseeing in this muddy weather. It is not quite as clear as the skies out in Nevada, but I hope you enjoy yourself while you are here.

Judge **Pro**. Thank you very much.
Senator **Leahy**. Thank you.
[The questions and answers referred to follow:]

QUESTIONS FROM SENATOR THURMOND FOR THE RECORD
PHILIP M. PRO, OF NEVADA, TO BE UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEVADA

Question: There is frequently a conflict between the deeply-felt constitutional views of a federal judge and the constraints of judicial precedent. How would you resolve the tension between personal jurisprudence and precedent?

Answer: As a trial judge I would carefully study the precedent, and if it was applicable I would feel constrained to follow it. However, I would point out in my opinion that there was a tension between the applicable precedent and my deeply-felt constitutional views. This would help the reviewing court decide whether it wished to reconsider the constraining precedent.

Question: The phrase "judicial activisim" is often used to describe the tendency of judges to make decisions on issues that are not within the scope of their authority. What does the phrase "judicial activism" mean to you?

Answer: Our courts provide a forum for resolving disputes between identifiable parties subject to the jurisdiction of the court. A judge should strive to resolve each dispute in accordance with the applicable constitutional, statutory and case law, as fairly, quickly and inexpensively as possible.

While doing this, courts must avoid using lawsuits as a vehicles for achieving results beyond the scope of the case they are adjudicating. Courts are not the best forum for deciding public policy.

The term "judicial activism" is often used to describe the tendency of courts to render decisions on issues that are not properly within the scope of the court's constitutional authority or administrative responsibility.

Judicial legislation, although no doubt well-intended by those who practice it, has the potential to frustrate our constitutional process. It usurps the capacity of the legislative branch of government to develop informed and creative solutions to issues of public policy.

The executive and legislative branches of government are empowered under the Constitution to propose and enact laws, and the members of those branches are accountable at election time to the public they serve. Courts are ill-equipped to provide a forum for comprehensive debate on issues of public policy.

Every judge must be mindful that his position is one of significant power and extraordinary responsibility. Judicial power must be exercised with great restraint to resolve only specific disputes properly before the court, in accordance with applicable statutory requirements, case precedent and constitutional safeguards.

Philip M. Pro

June 3, 1987

Senator LEAHY. Judge Kelly.

After the kind of introduction you got from your two Senators, you should feel that is enough for one day, but we will try also to go forward. Do you also have family here?

TESTIMONY OF HON. ROBERT F. KELLY, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge KELLY. Yes, Senator, I do.

Senator LEAHY. Would you introduce them, please?

Judge KELLY. I would like to introduce my wife, Pat, my daughter, Elizabeth, my second daughter, Johanna, my son, Owen, and my oldest son, Bob.

Senator LEAHY. That is quite a family.

Judge KELLY. Seated next to Bob is my life-long friend, Mr. Thomas Hayward, from Delaware County.

Senator LEAHY. It is nice to have you all here and I imagine, Mrs. Kelly and the others, this must be a proud moment for all of you.

Your résumé says you served for 4 years as the prothonotary? How do you pronounce that?

Judge KELLY. I always get that question, how do you pronounce it and what is it. Prothonotary.

Senator LEAHY. Prothonotary. Good Lord.

Judge KELLY. It is an archaic term. Only Pennsylvania has it, to my knowledge, and it is really the clerk for the civil court, civil trial court.

Senator LEAHY. Is that a full-time position?

Judge KELLY. No, it is not.

Senator LEAHY. But elected?

Judge KELLY. It is an elected position, yes.

Senator LEAHY. Now, since 1976 though, you have been a judge of the Court of Common Pleas. Is that civil and criminal?

Judge KELLY. That is civil and criminal, in Pennsylvania that is our chief trial court of unlimited jurisdiction.

Senator LEAHY. In Vermont it would be the Superior Court. Are there administrative duties also with that position?

Judge KELLY. Yes. In 1980-81, I was appointed as administrative judge to the Criminal Court of Delaware County. We had a large backlog at that time, and I had the administrative function but I did not stop with the trial work, so we worked our way out of the backlog. At the end of 4 years, we rotated someone else in and then I went into civil practice. I did not want to get too far away from the civil side of the court.

Senator LEAHY. One of the advantages of being a U.S. Senator is that you have a chance to come into contact with—and I mean this very seriously—some of the brightest minds anywhere among the people who work for the various committees, both Republicans and Democrats, I hasten to add. The Judiciary Committee has some of the finest lawyers I have met, again, both Republican and Democrat have been here.

I have been handed a note—I do not want to embarrass him—by Steve Metalitz, who I think is a superb lawyer but also one of the reasons he is so notable is that he reminds me of other things. I wish Senator Thurmond were still here. The prothonotary warbler or swamp canary is found in South Carolina. I want to make sure, Duke, that he is told that.

Judge **KELLY**. I just had to add that prothonotary warbler was the downfall of Alger Hiss in his case, if you recall.

Senator **LEAHY**. I remember that.

Judge **KELLY**. When Whitaker Chambers—he was crossed up on that.

Senator **LEAHY**. You are right. Both Senator Specter and Senator Heinz raised a very valid point about the Commonwealth of Pennsylvania, the enormous handicap the court is operating under, the one you have been nominated to serve. It is three judges short of its authorized strength. The position to which you have been nominated has been vacant since October 1985, 20 months ago when Judge Van Artsdalen retired, the other two slots remain vacant and no one has been nominated to fill them.

Now, we tried to expedite action on your nomination. I think we got it 4 weeks ago. Now, the vacancy has been 20 months. There are many in the Justice Department and certainly many in the press who are keeping track of how things are going here. There was a vacancy for 20 months; 19 of those, we waited for the Justice Department, and 1 of those 20 months waited for this committee. I think that shows we are ready to move them through.

I believe you first got involved in the selection process by responding to a note that was placed in a legal newspaper in Philadelphia. Do you remember about when that was?

Judge **KELLY**. I recall that I first went before that nomination commission in April of last year, so it would have been placed in there in March of last year.

Senator **LEAHY**. Then you were notified by Senator Heinz and Senator Specter that you had been recommended to the White House for nomination, is that correct?

Judge **KELLY**. That is correct.

Senator **LEAHY**. Do you remember when that was?

Judge **KELLY**. I believe it was approximately June 5th of last year.

Senator **LEAHY**. And then you were interviewed by the Justice Department?

Judge **KELLY**. Yes.

Senator **LEAHY**. Do you remember when that was?

Judge **KELLY**. When?

Senator **LEAHY**. Approximately.

Judge **KELLY**. It was during the summer, late July, I believe, of last year.

Senator **LEAHY**. Then the ABA did a backgrounder. Do you know how long that took?

Judge **KELLY**. Three and a half months.

Senator **LEAHY**. That brings us up around the end of 1986.

Judge **KELLY**. No, they did not start to do it until January 1st of this year. That is when they started, and it ran for 3½ months from then.

Senator **LEAHY**. Now the nomination has been pending here for only about 4 weeks, is that correct?

Judge **Kelly**. That is correct. I was nominated on May 1st.

Senator **Leahy**. In response to the committee questionnaire, you referred to *Commonwealth* v. *Forcino,* a case involving the use of a pen register which the police had installed to record the phone numbers dialed by a suspected member of a numbers racket. This case reflects what judges are seeing more and more, the response of law to new technology. We wrestled with some of those in the Congress, with the Electronic Communications Privacy Act last year.

The Federal courts, though, have all kinds of matters, patents, copyrights, and so on, in which Federal jurisdiction is exclusive. How do you learn enough about these things? How does any judge—I suppose you could ask the same question of doctors or anybody else, but how can a judge just keep up on all of these things?

Judge **Kelly**. With the technology, for example, of the pen register?

Senator **Leahy**. Yes.

Judge **Kelly**. As in this case, experts, so-called experts, we hope they are experts, come into court and testify and explain how the particular device operates, and relying upon experts—in this case, I believe the defense used an expert, too, because I think there was an allegation that this device went beyond what was allowed by Pennsylvania law. But to answer your question, we have to rely on experts who testify.

Senator **Leahy**. Do you feel that you have any difficulty in going over to the Federal court? I note that the bulk of your experience has been in State courts. Do you think you will have any difficulty?

Judge **Kelly**. I do not think so. Certainly, there are areas in Federal law that I will run into that I have never had any contact with. There are very good programs and seminars that are conducted for new Federal judges for that purpose. However, I have had a vast experience in general law. At the Villanova University Law School, I teach trial practice. There we use the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and Criminal Procedure. I taught there for 8 years, so a lot of that I am familiar with and a lot of the substantive law would be the same, so I feel that I would not have any difficulty making the transition.

Senator **Leahy**. Thank you very much. Again, we will have some questions from Senator Thurmond which I would ask you to respond to as quickly as possible, as I suspect your nomination will go on the calendar of the full committee very soon, but I think that you will not have to lose a great deal of sleep over the outcome of that.

Judge **Kelly**. Thank you very much, Senator.

Senator **Leahy**. Thank you.

[The following was subsequently supplied for the record:]

QUESTIONS FROM SENATOR THURMOND - FOR RECORD

QUESTIONS FOR JUDGE ROBERT F. KELLY, OF PENNSYLVANIA, TO BE UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1. Judge Kelly, Thomas Jefferson remarked shortly after the Ratification of the Constitution that "Our Nation's particular security is the possession of a written Constitution. Let us not make it a blank paper by construction." Judge Kelly, what do you think he meant by that warning: "Let us not make it a blank paper by construction"?

I believe Mr. Jefferson meant that the plain words of the Constitution are a definitive statement of the will of the people of the United States and binding on all. If a Court does not agree with the plain meaning or if it thinks that the plain meaning no longer expresses the will of the people, it should not amend the Constitution under the guise of judicial construction. For if a Judge is free to change the Constitution by this method, then the written Constitution exists only so long as the Courts agree with it. If that is so, then the paper upon which the Constitution is written is blank.

2. Judge Kelly, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

As a Federal Judge, I would be sworn to uphold the Constitution and the laws of the United States. Therefore, I would follow the law rather than my own personal opinion.

Robert F. Kelly

Robert F. Kelly J.

Senator **Leahy**. And lastly we have Judge Turner, to be Judge of the U.S. Claims Court.

Judge, do you have family here?

TESTIMONY OF HON. JAMES T. TURNER, A NOMINEE TO BE JUDGE OF THE U.S. CLAIMS COURT

Judge **Turner**. No, sir, my wife is a school teacher and she is trying to prepare students for exams next week and my son is in college and is trying to prepare himself for exams next week, so I let them put first things first.

Senator **Leahy**. I have a daughter in college and a son in high school. They are both in the middle of final exams and the two of them are particularly harried about it.

Are you admitted to practice before the U.S. Claims Court or its predecessor?

Judge **Turner**. No, sir. My practice was almost entirely within the State of Virginia, and I never did have a case in the Court of Claims.

Senator **Leahy**. So you have not had legal business before the Court?

Judge **Turner**. That is correct.

Senator **Leahy**. How are you going to acquaint yourself with the procedures? It is a fairly specialized, kind of unique court, with a unique bar as well as bench.

Judge **Turner**. Yes, sir. There are several ways. For one thing, I think most of the procedures are set out either in statutes or in rules, and I have already acquired a set of the rules of procedure. They are patterned after the Federal Rules of Civil Procedure, but there are some differences and some very helpful appendices dealing with case management. I have already familiarized myself with those. In addition, I have familiarized myself with the jurisdictional statutes and the procedural statutes that apply.

Beyond that, I think a lot of the Claims Court work involves Federal contracts and I have dealt with Miller Act litigation as a Federal magistrate and some other litigation involving contracts with political subdivisions patterned more or less after Federal contracts.

Senator **Leahy**. I had a few of those Miller Act cases myself back in private practice days. You end up settling a lot more cases, of course, in that jurisdiction as well as any other than you do in trying them. Do you have experience as a magistrate in helping or supervising and encouraging the settlement of cases?

Judge **Turner**. Yes, sir. We have a very heavy load of asbestos litigation. There are pending cases now involving over 400 plaintiffs just in the Norfolk Division of the Eastern District of Virginia, and the court is trying to bring on for trial either 8 or 10 cases a month, in groups of 4 or 5, and the other Federal magistrate and myself have each been assigned to take one of those groups each month in an effort to get the cases settled. We have been successful so far in bringing all of them to settlement that have come on since last fall. So I have had a fair degree of experience along that line.

Senator **Leahy**. Of course, in the Claims Court every single time the defendant is the United States.

Judge TURNER. Yes.

Senator LEAHY. Now, we are all taxpayers. Any judgements in the claims court come out of the Federal purse. Are you going to be able to just look at the United States as just the defendant or as part of your tax dollars?

Judge TURNER. I do not have any question but that I will be able to look at the United States as just another defendant. I have had eight years' experience in trying to be absolutely objective and fair. I have had an opportunity to go through the mental processes and I do not have any question about it.

Senator LEAHY. You belong to the Harbor Club in Norfolk.

Judge TURNER. Yes, sir.

Senator LEAHY. What are its membership policies?

Judge TURNER. It is absolutely unrestricted. I think the club was formed in 1968 and when initially formed, the membership itself was restricted to males only but it was never restricted on the basis of race or religion. About the mid-seventies, though, that males-only policy was dropped. Since, I would say, at least 1975 it has been absolutely open to everyone.

Senator LEAHY. It has women as members now?

Judge TURNER. Yes, sir.

Senator LEAHY. Blacks as members now?

Judge TURNER. Yes, sir.

Senator LEAHY. Again, I would ask that you answer the questions that have been asked by Senator Thurmond as quickly as you can so that we can put this matter on the calendar. I suspect you also will not have much trouble, so you probably want to bone up as much as you can on the rules of the Claims Court.

Judge TURNER. Yes, sir.

Senator LEAHY. Thank you very much.

Judge TURNER. Thank you.

Senator LEAHY. Unless there is something else to come before us, we will stand in recess.

I thank you all.

[Whereupon, at 3:08 p.m., the committee was adjourned.]

QUESTIONS FROM SENATOR THURMOND
FOR
JAMES T. TURNER OF VIRGINIA,
NOMINEE FOR THE POSITION OF JUDGE OF
THE UNITED STATES CLAIMS COURT,
TOGETHER WITH ANSWERS OF THE NOMINEE

1. Mr. Turner, you have served as a United States Magistrate since 1979. Now the President has nominated you to be Judge of the United States Claims Court. Would you tell the committee what steps you have taken to prepare yourself for this important position.

All of my activities as a Federal Magistrate are directly translatable to work on the U. S. Claims Court. A U. S. Magistrate is heavily involved in statutory analysis, contract interpretation, tax questions and, of course, case management. Indeed, even work in criminal cases and in jury trials develops skills in analysis and case management.

Further, since learning that I was likely going to be nominated, I have obtained and studied a set of the Claims Court procedural rules and have studied the jurisdictional and procedural statutes applicable to the Claims Court.

2. Mr. Turner, I consider judicial temperament to be a prerequisite for a Federal Judge. Would you give me your thoughts on this subject?

I completely agree that judicial temperament is essential for a Federal judge. One reason that judicial temperament is important is that Federal litigants must rely on the judge to maintain decorum, even handedness and fairness in an atmosphere where lawyers and litigants can do their best work.

James T Turner

James T. Turner

Dated: June 3, 1987

BIOGRAPHY

ROBERT HOLMES BELL

Birth:	April 19, 1941	Lansing, Michigan
Legal Residence:	Michigan	
Marital Status:	Married	Helen R. Mortensen 3 children
Education:	1962 - 1966	Wheaton College B.A. degree
	1966 - 1969	Wayne State University Law School J.D. degree
Bar:	1970	Michigan
Experience:	1969	Ingham County Prosecutor's Office Intern
	1970 - 1972	Assistant Prosecuting Attorney Ingham County
	1970 - 1971	Private Practice
	1973 - 1978	District Court Judge State of Michigan
	1979 - present	Circuit Court Judge State of Michigan
Office:	Courthouse Mason, Michigan 48854 517 676-3555 or 517 482-0650	
Home:		

To be United States District Judge for the Western District of Michigan

JUDICIAL NOMINEE QUESTIONNAIRE

of

ROBERT HOLMES BELL

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name. (include any former names used).

   Robert Holmes Bell

2. Address:

   Residence: 1971 Cimarron Drive, Okemos, Michigan 48864
   Office: Ingham County Courthouse, Mason, Michigan 48854

3. Date and place of birth.

   April 19, 1944 at Lansing, Michigan.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

   Married: Helen Ruth Mortensen Bell
   Occupation: housewife.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   -Wheaton College, Wheaton, Illinois
   attended Fall 1962 to Spring 1966
   Bachelor of Arts Degree-June 1966

   -Michigan State University, summer school, 1964

   -Wayne State University Law School, Detroit, Michigan
   attended Fall 1966 to Spring 1969
   Juris Doctor Degree -June 1969

6. Employment record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   A. Self-employed in exterior house and barn painting summer 1966, summer 1967.

   B. Neighborhood Legal Services, Detroit, Michigan, Legal Intern in Legal Aid Office, summer 1968.

   C. Assistant Prosecuting Attorney, June 1969, to Dec. 31, 1972
   Ingham County Prosecuting Attorney's Office
   Lansing, Michigan

   D. Part-time Private Practice of Law, Jan. 1970 to Dec. 31, 1972; Lansing, Michigan.

   E. District Court Judge, January 1, 1973 to December 31, 1978
   55th District Court
   Mason, Michigan.

   F. Circuit Court Judge, January 1, 1979 to present
   30th Judicial Circuit Court
   Mason, Michigan

G. Owned and operated a small cash-crop farm, 1975-1984.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

I cannot name any as specifically asked in this question.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

State Bar of Michigan
-Chairperson of Committee on Character and Fitness to practice law. 1981-1982. (In conjunction with State Bar Staff successfully implemented a new district panel system of committees with procedures and guidelines, including appeals to the State Committees).
-member of Committee on Scope and Correlation - 1986 to present.

Ingham County Bar Association
-Board Member and Director 1979-1985 (participated in reconstituting a more representative and extensive professional bar association).

-Member Court Facilities Consolidation Study Committee, 1983 to present.
-Member Judicial Qualifications and Evaluation Committee for rating judicial candidates, 1985 to present.

Ingham County Trial Judges Association
-President, 1982

American Bar Association

American Judicature Society

Christian Legal Society
-Co-chairperson of Annual State Conferences 1984 and 1985.

The Federalist Society for Law and Public Policy Studies.

Ingham County Circuit Court Committees
-Chairperson of the Ingham County Circuit Court Bench-Bar Mediation Committee for divorce, tort and commercial mediation. Successfully designed and implemented a mediation procedure which has become a statewide model, 1981 to present.
-Docket Delay Reduction Committee, 1984 to present.
-Advisory Committee on Divorce Family Counseling, 1985 to present.

Michigan Judges Association
-Member Docket Delay Reduction Committee -1985 to present.

Michigan District Judges Association
-Board member, officer and committee chairperson, 1974-1978.

Committee member of the Michigan Supreme Court Academic Committee for Circuit and Recorders' Court Judges. 1982 to present.

Legal Aid of Central Michigan
-Member of the Board of Directors, 1979-1981.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

East Lansing Trinity Church
Rotary Club of Mason
Ingham County Commission for Historic Courthouse Restoration
Meridian Township Historical Society
State Republican Party
Wayne State University Alumni Association
-member of Executive Committee, 1986 to present.

11. Court Admissions: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

State Bar of Michigan - January 23, 1970
Western District of Michigan Federal Courts - May 8, 1970
United States Supreme Court - July 18, 1977

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published writings and speeches:

Primary author of article entitled "Medical-Legal Aspects of Veterinary Medicine" by Honorable Robert Holmes Bell and Gavin L. Meerdink, DVM. This article was published in The Journal of The Proceedings of the American Association of Veterinary Laboratory Diagnosticians, 1983, Volume 25, page 491.

I am a frequent speaker to civic groups, service clubs and high schools in addition to regular law school teaching and participation as a speaker at judicial seminars. The topics I discuss focus on the practical issues facing the trial judiciary, such as jury utilization, court docket control, criminal sentencing and alternative dispute resolution.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent Health
Last date of physical examination was January 20, 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

District Court Judge

Elected in non-partisan election on November 7, 1972, and served from January 1, 1973 to December 31, 1978.

The Michigan District Court is a limited jurisdiction statutory court. Civil jurisdiction includes lawsuits claiming damages under $10,000, Landlord-tenant cases, land contract forclosure and Small Claims matters. Criminal jurisdiction includes exclusive jurisdiction over all misdemeanors of one year or less and preliminary examination jurisdiction over all high court misdemeanors and felonies.

Circuit Court Judge

Elected in non-partisan election on November 7, 1978 and re-elected on November 6, 1984, thus serving from January 1, 1979 to the present.

The Michigan Circuit Court is a constitutionally created general jurisdiction court with exclusive jurisdiction over all matters in equity, lawsuits claiming damages of over $10,000, and felony criminal matters. The Ingham County Circuit Court has been granted exclusive jurisdiction over all lawsuits filed against the State of Michigan, all state agency appeals and state statutory constitutional challenges due to the fact the state capital is within the County. This "state" activity accounts for approximately 40% of the judicial time commitment.

Visiting Court of Appeals Judge by assignment of Michigan State Court Administrator for month long assignments nearly once a year since 1982 reviewing on appeal judicial decisions rendered by Circuit Judges and Detroit Recorders Court Judges.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written:

[Please note that in the "Appendix 15 (1)" are contained the text of these opinions] [Appendix on file with committee.]

(A) Northern Michigan Exploration Company, et al v. Michigan Public Service Commission and Shell Oil Company, et al

File Nos. 82-30061-AA; 82-30077-AA; 82-30085-AA

Affirmed by the Court of Appeals at 153 Mich App 635 (1986).

(B) George F. Klammer v. State of Michigan, et al

File No. 81-27412-CZ

Affirmed on appeal at 141 Mich App 253 (1985)

(C) Attorney General Frank J. Kelley v. Michigan Public Service Commission and Consumers Power Company.

File No.82-31058-AA

Association of Businesses Advocating Tariff Equity (ABATE) et al v. Michigan Public Service Commission and Consumers Power Company.

File No. 82-31070-AA

Affirmed on appeal on June 11, 1986, Nos. 81420, 81573 and 81574 in an opinion which incorporates This trial judge's opinion as an appendix thereto.

(D) Michigan Civil Service Commission v Michigan Department of Labor, et al

File No. 85-54780-CZ

Dennis Matulewicz, et al v James J. Blanchard, et al

File No. 85-54827-CZ

Reversed on appeal by the Michigan Supreme Court in a 4 to 3 decision reported at 424 Mich 571 (1986).

(E) Luthern High School Association of Greater Detroit v City of Farmington Hills, et al

Court of Appeals File No. 73101

This Judge participated as a visiting Court of Appeals Judge and authored this opinion released November 4, 1985 but not, as yet, published.

(F) Attorney General Frank J. Kelley v James J. Beno, D.C.

File No. 77-20780-AZ

Affirmed by Court of Appeals at 124 Mich App 342 (1983), but partially affirmed, partially reversed by the Michigan Supreme Court at 422 Mich 293 (1986).

(G) Francis Pletz et al v Secretary of State

File No. 81-27009-CZ

Reversed on appeal at 125 Mich App 335 (1983)

(H) Maccabees Mutual Life Insurance Company v State Department of Treasury

File No. 6673 (Court of Claims)

Affirmed on appeal at 122 Mich App 660 (1983).

(I) Butler v Detroit Automobile Inter-Insurance Exchange

121 Mich App 727 (1982)

This Judge participated as a visiting Court of Appeals Judge and authored this opinion.

(J) Pleze Moore and Ada Moore v City of Detroit

128 Mich App 491 (1983)

This Judge participated as a visiting Court of Appeals Judge and authored this opinion, but it was filed and published as a per curiam opinion.

15(2). A short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

15(3). Significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(Before answering the above question 15(2) and (3) an explanation is necessary. Having been since January 1, 1979 in the busy 30th Circuit State Court of General Jurisdiction, the issues involved differ from other Circuit Courts. Because the 30th Circuit has within its geographical boundaries the State Capital, the Legislature has conferred considerable additional jurisdiction over appeals from state agency determinations, the Court of Claims against the state and the forum for the resolution of state constitutional issues.

Accordingly, to date approximately 400 appeals have been taken from This Judge's rulings. The majority of these appeals have either been decided in the parties dismissal of appeal or an unpublished opinion with the usual result of affirmance. To date approximately 100 appeals have resulted in published opinions. I shall, therefore, confine my answer to this question to those published opinions which involve significant rulings. Should a recitation be requested of the other opinions, it will be expeditiously provided.)

1. Molony-Vierstra v Michigan State University

   101 Mich App 353 (1980); 417 Mich 224 (1983)

   The Supreme Court reversed both this Judge and the Court of Appeals as to whether a state chartered university has the constitutional authority to enact an ordinance authorizing the towing of motor vehicles illegally parked.

2. Hutchinson v Department of Mental Health

   310 NW 2d 856; 108 Mich App 725 (1981)

   Affirmance of this Judge's construction of the standard of review of state abolition of positions for administrative efficiency when challenged that termination was for political reasons.

3. Attorney General v Michigan National Bank

   312 NW2d 405; 110 Mich App 106 (1981)

   Reversal of this Judge's construction of mortgager's right to change method of escrow tax accrual to require judicial determination of reasonableness when challenged.

4. People v Borney

   313 NW 2d 329; 110 Mich App 490 (1981)

   Affirmed as to this Judge's rulings on numerous evidentiary questions, jury instructions and statutory construction issue in a major criminal case.

5. Local 526, AFL-CIO et al v State

   313 NW 2d 143; 110 Mich App 546 (1981)

   Reversed on the issue of the use of sex and race as factors for determining state employee qualifications contrary to this Judge's determination that to do so violated the State constitution.

6. People v Chaplin

   302 NW2d 569; 102 Mich App 748 (1980)
   412 Mich 219 (1981)

   Supreme Court reversal of conviction previously affirmed by the Court of Appeals on the issue of latitude permitted the Prosecution in cross-examining and impeaching a defense witness.

7. In the Matter of Curry

   318 NW 2d 567; 113 Mich App 821 (1982)

   Reversal of this Judge upholding a Probate Court finding that the criminality of parents can constitute grounds for determining unfitness of home.

8. W.R. Grace Co. v Department of Treasury

   320 NW2d 62; 115 Mich App 69 (1982)

   Affirmance of this Judge's construction of an "affiliated group" of corporations for purposes of Michigan Single Business Tax Act.

9. Altman et al v Michigan National Bank

   321 NW2d 707; 115 Mich App 495 (1982)

Affirmance of a large "taxpayers suit" involving issues of laches, standing and lis pendens.

10. Mintener v Michigan National Bank

117 Mich App 633 (1982)

Affirmance of this Court's ruling that a mortgagee can also be a bankruptcy trustee without breaching a fiduciary duty to debenture holders.

11. Michigan Department of Civil Rights v Sparrow Hospital Association

119 Mich App 387 (1982)
423 Mich 548 (1985)

Reversal by the Supreme Court of trial judge's ruling which had been affirmed by the Court of Appeals denying attorneys fees after determining sexual descrimination had taken place, but that such discrimination was not eggregious nor did it prohibit gainful employment.

12. Parisi v Michigan Township Association

322 NW 2d 587; 123 Mich App 512 (1983)

Reversal of this Judge's determination of whether the statute of limitations for malicious prosecution tolls when the underlying matter is on appeal.

13. Elliott v Department of Social Services

333 NW 2d 31, 124 Mich App 124 (1983)

Affirmance of this Judge's ruling that a mere characterization of a claim as an intentional tort takes the activity outside the ambit of governmental immunity where the complained of act is one of omission not commission.

14. Sherman v Michigan Mutual Insurance Company

335 NW2d 232; 124 Mich App 700 (1983)

Reversal of this Judge's ruling as to the application of the definition of "occupying" a motor vehicle for purposes of insurance coverage and thereby differentiating this from numerous cases previously relied upon.

15. Detroit Inter-Insurance Exchange v Commissioner of Insurance

336 NW 2d 860; 125 Mich App 702 (1983)

Affirmance of this Judge's determination of constitutionality of a statute requiring hearings officers be independent of the Commissioner of Insurance in contested administrative matters involving insurance licensing.

16. People v Thomas

337 NW 598; 126 Mich App 611 (1983)

Affirmance of First Degree Murder conviction in which this Judge's method of jury selection, ruling on physical evidence, determination of confession voluntariness and jury instructions was upheld.

17. Curtin v Department of State Highways

339 NW 2d 7; 127 Mich App 160 (1983)

Reversal of This Judge's ruling as to the constitutionality of a statute treating post-judgment interest differently for governmental tortfeasors than private tortfeasors.

18. K-Mart Corp. v Department of State

339 NW 2d 32; 127 Mich App 390 (1983)

Reversal of this Judge's ruling requiring the promulgation of rules defining the standard of "unnecessary repairs" before administrative action can be brought against a licensed car repair facility.

19. Lenawee County Road Commission v Department of Transportation

340 NW2d 32; 128 Mich App 528 (1983)

Affirmance of this Judge's ruling that an action for contribution is not within the scope of the statute permitting suits against the Department of Transportation as an exception to governmental immunity.

20. Hall v Hall

341 NW 2d 206; 128 Mich App 757 (1983)

Reversal of this Judge's denial of a petition of a state prisoner for habeas corpus ad testificundum where prisoner wanted to proceed in divorce action.

21. Murphy v Dairyland Insurance Co.

Court of Appeals No. 50028 (unpublished)
417 Mich 602 (1983)

Reversal by the Supreme Court of this Judge's ruling applying the insurance act provisions to a motorcycle within the statutory criteria of "vehicle" and "motor vehicle".

22. Royston v State Farm Mutual Automobile Insurance Company

344 NW 2d 14; 130 Mich App 602 (1983)

Affirmance of this Judge's ruling as to the meaning of the insurance law provision permitting coverage on "loading" and "unloading" of motor vehicles.

23. Northern Michigan Exploration Company v Public Service Commission

345 NW 2d 618; 131 Mich App 571 (1983)

Affirmance of this Judge's discretion exercised in dismission a case for "No Progress" following a contested hearing.

24. Attorney General v Public Service Commission #1 and #2

349 NW2d 539; 133 Mich App 719 (1984)
350 NW2d 320; 133 Mich App 790 (1984)

Affirmance of this Judge's Opinions in a series of very complex regulatory appeals of utility rate adjustments called Systems Availability Incentive Provisions (SAIP) and Operation and Maintenance expenses (O & M).

25. People v Switzer

355 NW 2d 670; 135 Mich App 779 (1984)

Reversal of a Second Degree Murder conviction involving this Judge's trial ruling as a matter of first impression in Michigan that an involuntary confession coerced by and made to a private citizen by the defendant cannot be introduced against a defendant at trial.

26. Berrien County v State of Michigan

357 NW 2d 764
136 Mich App 772 (1984)

Affirmed in part, reversed in part this Judge's determination of statutory constitutionality of state revenue sharing of medical payments for county run medical care facilities.

27. Theroux v Doerr

357 NW 2d 327
137 Mich App 147 (1984)

Reversal of this Judge's change of custody in a divorce case on the basis that the parents' previous custody agreement supersedes current best interests of the child. (It is contrary to Moser v Moser 130 Mich App 97 (1983).

28. Tomiak v Hamtramck School District

360 NW2d 257
138 Mich App 644 (1984)

Supreme Court docket no. 75897, decided December 22, 1986.

Supreme Court Affirmance of this Judge's opinion as to "abandonment" under the Teacher Tenure Act, thereby reversing the Court of Appeals which had previously reversed this trial judge.

29. Armco Steel v Department of Treasury

315 NW2d 158; 111 Mich App 426 (1981)
419 Mich 582 (1984)

Affirmance by the Supreme Court and Court of Appeals with this Judge's ruling that 1978 Public Act 392 was unconstitutional in that no rational basis existed to justify the disparate treatment of corporate taxpayers who paid franchise fee deficiency assessment following unauthorized audits and recomputations by the department over taxpayers who refused or withheld payment.

30. Vandebunte v City of Lansing

362 NW2d 889; 140 Mich App 60 (1985)

Reversal of this Judge's holding as to jurisdiction by concluding that the Tax Tribunal has no jurisdiction for hearing cases contesting assessments authorized by the Public Health Code for correcting or removing a public health hazard on private property at the owners expense.

31. Martin v Department of Corrections

140 Mich App 323 (1985)
424 Mich App 553 (1986)

Reversal of this Judge's ruling that state prisoners are not the "public" as defined in the Administrative Procedures Act which requires all state agency rules be published which affect the general public. Defendant here was charged with misconduct violations promulgated by administrative guidelines.

32. Covell v Spengler

366 NW 2d 76
141 Mich App 76 (1985)

Affirmance of this Judge's finding that the 90 day statute of limitations is constitutional under the "Whistleblowers Protection Act."

33. Automatic Music and Vending Corporation v Liquor Control Commission

141 Mich App 458 (1985)
426 Mich 452 (1986)

The Supreme Court reversed both this Judge and the Court of Appeals declaring that mechanical amusement devices which rely partially upon skill to secure free replays are prohibited by state gambling statutes.

34. Darnell v Auto-Owners Insurance Company

369 NW 2d 243
142 Mich App 1 (1985)

Affirmance of this Judge's many rulings in a complicated insurance case involving a priority statutory scheme and finding of lack of ability to rescind insurance policies in after discovered fraud situations.

35. Marsh v Department of Civil Service

370 NW 2d 613
142 Mich App 557 (1985)

Reversal of this Judge's ruling that constitutionally created State Civil Service Commission has exclusive jurisdiction over grievance lodged by a state employee on the basis of race, sex and handicap.

36. Hobrla v Glass

372 NW 2d 630
143 Mich App 616 (1985)

Affirmed this Judge's findings that the Secretary of State's non-enforcement of a statutory requirement to suspend a driver's license does not give rise to liability for injury occasioned by that driver.

37. Trotter v Hamill Mfg. Co and Ford Motor Company

372 NW2d 622
143 Mich App 593 (1985)

Affirmed this Judge's ruling in a products liability case that a manufacturer has no duty to warn in anticipation, nor may liability be imposed upon it, for user alteration of products.

38. Jansson v Department of Corrections

379 NW2d 410
146 Mich App 172 (1985)

Affirmance of this Judge's ruling determining that the Department of Corrections is not required to promulgate rules with respect to the placement of inmates in regional prisons.

39. Mitchell v Trustees of U.S. Mutual Real Estate Investment Trust

375 NW2d 424
144 Mich App 302 (1985)

Reversed this Judge's finding that a "wrap around" mortgage became entitled to first secured priority in the event of foreclosure.

40. Graves v City of Lansing

385 NW2d 785
149 Mich App 359 (1986)

Affirmed this Judge's conclusion that the plaintiff, a former mayor of the City of Lansing, while legally a regular, full-time employee of the city is not entitled to unused sick and vacation days at the conclusion of his tenure in office.

41. People v Daisy Elliott

Circuit Court File No. 82-32224-FY
Court of Appeals No. 68809 (unpublished)

Affirmance of jury conviction obtained after lengthy and widely publicized stolen property trial against a prominent state legislator. Numerous factual and legal issues were appealed.

42. Michael Bruno v Michigan Department of Treasury

Court of Claims file No. 84-9556
Court of Appeals No. 87152 - deceision rendered January 6, 1987 and not published to date.

Affirmed This Judge's opinion by quoting lengthy portions of it when concluding a professional gambler's income fits within Michigan Income Tax Act definition of a trade of business and in accord with Federal Income Tax treatment.

43. Consumers Power Company v Attorney General
Citizens for Capital Punishment v Board of State Canvassers

Court of Appeals Nos. 94110, 94229 and 94568 (1986)
(not published to date)

Supreme Court Nos. 79277, 79278 and 79294 (1986)
Affirmed: (Decided August 26, 1986) 426 Mich 1

These consolidated actions concerned the question of whether the Legislature has the constitutional authority to place a time limitation upon the collecting of signatures required for a citizen's petition initiative to place a proposal on the ballot for the general election. This Judge's highly publicized ruling effectively taking proposals off the ballot by finding legislative constitutional authority-was unanimously affirmed by both the Court of Appeals and the Supreme Court.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.)

I have never run for office unsuccessfully nor have I sought any office other than a judicial office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

A. After graduation from law school in June of 1969, I immediately began work as a legal intern for the Ingham County Prosecuting Attorney's Office in Lansing, Michigan. I did legal research, prepared complaints and warrants, interviewed complainants and assisted office trial lawyers.

Upon securing favorable results of the summer 1969 bar examination, I was appointed an Assistant Prosecuting Attorney serving under Prosecutor Raymond L. Scodeller and Chief Assistant Donald E. Martin. From July 1, 1971 to December 31, 1972, I served as Chief Trial Attorney for that office.

From admittance to the bar until July, 1971 (approximately 1 1/2 years) I was permitted a limited private practice and did acquire clients and commence divorce cases, bankruptcy cases, collection.

The practice of law ceased with my successful election to the District Court bench and my assumption of judicial responsibilities on January 1, 1973.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

B. Prior to becoming a judge, my practice was almost exclusively criminal prosecution. A small percentage of time involved civil prosecution office matters and limited private practice.

The clear majority of the almost exclusive criminal prosecution practice was devoted to the trial phase of misdemeanors and felonies having extensive contact with victims, police officers, defense attorneys and trial judges.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

C.(1) Appearances in trial courts were regular and almost daily.

c. 2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

C.(2) 100% of appearances were in State Courts of record.

c. 3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

C.(3) 5% civil
95% criminal

c. 4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.)

C.(4) In the 3 years of practice after bar admittance and before assuming the bench approximately 100 cases (felony and misdemeanor) were tried to verdict or judgment.

c. 5. What percentage of these trials was:
(a) jury:
(b) non-jury.

C.(5) 60% jury (approximate)
40% non-jury (approximate)

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. People v Charles E. Oliphant, Reported on Appeal at 52 Mich App 242 (1974) and 399 Mich 472 (1976)

I was the only attorney prosecuting Mr. Oliphant for a series of alleged rapes. The first two instances resulted in acquittal. Initially this case was a hung jury. At the final trial I successfully persuaded the trial judge to permit the facts and circumstances from the matters in which Mr. Oliphant had been acquitted to be used to illustrate a common scheme and pattern employed in the crime at issue. It was a criminal case of considerable publicity and magnitude at the time of trial in May, 1972. The resulting guilty verdict was upheld by the appellate courts. The opposing attorney, William G. Jenkins, has retired from practice and apparantly has left the area. Counsel for Mr. Oliphant in the former trials was James L. Theophelis, 721 North Capitol Ave, Lansing, Michigan (517)482-4300.

2. People ex rel Ingham County Prosecutor v East Lansing Municipal Judge; Reported on appeal at 42 Mich App 32 (1972).

I was the Prosecuting Attorney in the lower court and worked closely on the appeal with colleague James A. Ramsey (now deceased). The issue was the discretion of the judge to permit a defense attorney to stage a lineup without the safeguards required of a police lineup. The appeal affirmed the lower court.

3. People v Aldridge ; 47 Mich App 632 (1973/74)

I was the trial attorney and assisted in the appeal of the important issue of defense discovery of certain police and prosecutor files, in this case the police file on the prospective jury panel. The appeals court reversed the conviction.

Due to the length of time which has transpired since assuming the bench, I am unable to reconstruct meaningfully other cases and reported decisions I was involved with while in practice. Below are listed Judges before whom I appeared regularly during that time:

1. Honorable James J. Wood - 54-A District Court
   City Hall
   Lansing, Michigan (517) 483-4433

2. Honorable Earl E. MacDonald (retired) 54-A District Court
   1018 West Lapeer St.
   Lansing, Michigan (517) 482-0247

3. Honorable Donald L. Reisig (Retired) 30th Circuit Court
   520 Seymour St.
   Lansing, Michigan (517) 372-7780

4. Honorable Marvin J. Salmon (Retired) 30th Circuit Court
   2934 Mt. Hope
   Okemos, Michigan (517) 351-8677

5. Honorable Jack W. Warren (Retired) 30th Circuit Court
   2300 Lamb Road
   Mason, Michigan (517) 485-1721 (office)

Attorneys who represented opposing parties:

1. Jonathan E. Maire
   437 West Ionia
   Lansing, Michigan (517) 487-3736

2. Gerald Oade
   271 Woodland Pass
   East Lansing, Michigan (517) 351-3550

3. Mark Latterman
   215 South Washington Square
   Lansing, Michigan (517) 484-7723

4. W. Charles Kingsley
   6105 West St. Joseph
   Lansing, Michigan (517) 323-2026

5. Kenneth DeBoer
   615 North Capitol
   Lansing, Michigan (517) 371-5889

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In addition to lengthy judicial experience, I have been extensively involved in legal education matters. I have taught Fundamentals of Traffic Law at Michigan State University, lectured on criminal law at various police and prosecutor schools, taught court procedure at various Young Lawyer Conferences and have, since 1977, been an Adjunct Professor of Law at Thomas M. Cooley Law School in Lansing, Michigan. I am currently the Jurisprudence Professor, having also taught District Court Practice and Trial Advocacy.

I am a faculty member of the Michigan Judicial Institute having taught a wide range of judicial education classes concerned with practical aspects of a trial judges continuing legal education since 1979. Between the years 1975 and 1984, I was a frequent faculty instructor for The National Judicial College in Reno, Nevada. These teaching experiences have greatly enriched my judicial career.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I can think of no potential conflicts of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   I anticipate the probability of continuing as an adjunct professor at T.M. Cooley Law School in Lansing teaching law subjects for a modest honorarium.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   I have had no role in any campaign except those related to my successful judicial candidacies in 1972, 1978 and 1984.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial" activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of the Federal judiciary within the structured framework of the federal government necessarily requires an observation of what was intended for the judicial branch within the constitution and its amendments.

Certainly the constitution intended three co-equal branches of government. The very structure of the branches of government demonstrates that the democratic system is bottomed on the legislative process. The legislative branch and executive branch are vested with the authority to make fundamental public policy choices. The primary task of the courts is to effectuate those choices. The judiciary is therefore inherently limited in its capacity to apprehend and appropriate a vision of what is in the "public good". The judiciary should, therefore, not substitute its own policy preferences for the determination made by the public's elected representatives. Its role may be one of law's interpretation but certainly not of law making.

The judiciary necessarily concerns itself with problems brought by litigants and has a very limited ability to deal with the various dimensions of a problem's origin or context. For instance, large scale social problems confronting Legislative and Administrative agencies which have investigatory powers, financial powers, oversight powers and clearly defined statutory or constitutional policy making authority whereas the Courts are designed to render but a single dimensional verdict, order or opinion.

The Principles of Federalism demand that the Federal Judiciary must tolerate divergencies among the various states and political subdivisions. There must be a substantial and compelling justification made before the Federal Courts are free to intervene in the affairs of the state or political subdivision. This Judicial self-restraint is, therefore, consistent with the Constitutional balance of power inherent in the aforementioned three branches of government.

Because Federal Courts are designed to entertain only cases and controversies, they should confine their deliberations and conclusions to only the circumstances necessary to resolve the dispute. This singular task is consistent with stare decises and the Rule of Law. It promotes predictability, stability and security through law. To extend the case and controversy to potential other litigants or the solution to larger problems is to abandon the case resolution function assigned to the courts and take up a public policy determination function assigned constitutionally to other branches of government.

The jurisdiction of the Federal Courts should be clearly defined by Constitution and Congressional Acts. To enlarge upon such jurisdiction or engraft exceptions therein is to usurp, potentially, the role of another forum. For instance, an aggrieved citizen who believes he must address his government for a change in public policy should have but one forum - petitioning his legislature - rather than parlaying such grievance into a judicial case requiring a judicial solution. Finally, in addition to the usurpation of another governmental branches' responsibilities is the probable taxation of the already burdened resources of the judiciary which should be devoted to handling those matters clearly and exclusively within its jurisdiction.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged?

While in law school in Detroit, I witnessed first hand the aftermath of the Detroit riots of 1967 and the social cycle of poverty and despair surrounding that historical era. I became extensively involved in a Legal Aid Clinic run by law students of Wayne State University Law School. In my third year of law school, I was President of the Board of Directors of the non-profit corporation which operated the Legal Aid Clinic.

After law school graduation and prior to election to the state judiciary, I regularly provided minor legal services to persons unable to pay for these services on a pro bono basis. While an Assistant State Prosecuting Attorney, I scrupulously adhered to a policy of encouraging criminal defendants to secure court appointed counsel whenever I observed they could not afford appointed counsel.

My initial service as a state district judge for six years dramatically focused upon the many persons in that lower court without lawyers in criminal and civil cases. I developed simple, clearly-worded pamphlets for criminal defendants to read explaining their legal rights and what court procedures they could expect. I also authored a well-received pamphlet for tenants and landlords explaining the obligations and rights each had contractually undertaken in housing rental matters.

I have served as a Board Member of the Legal Aid of Central Michigan Inc., funded now by the Legal Services Corporation. In that capacity, I helped formulate policy decisions affecting the delivery of legal service to the poor and disadvantaged.

Finally, in my somewhat lengthy tenure as a state trial judge, I have been especially conscious whenever a litigant was without counsel or the opposing litigant appeared to represent a larger or more popular interest to see that both justice and the appearance of justice was present. This has entailed numerous explanations of why I was doing what I was doing and what was to be expected in future phases of litigation. Throughout the years, I have received many, many letters and cards from litigants, witnesses and jurors attesting to this realization.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS	
Cash on hand and in banks	$5,000.
U.S. Government securities—add schedule	-0-
Listed securities—add schedule	-0-
Unlisted securities—add schedule	-0-
Accounts and notes receivable:	
Due from relatives and friends	-0-
Due from others	-0-
Doubtful	-0-
Real estate owned—add schedule	185,000.
Real estate mortgages receivable	-0-
Autos and other personal property	60,000.
Cash value—life insurance	-0-
Other assets—itemize: contributory vested pensions	35,000.
Total assets	285,000.

LIABILITIES	
Notes payable to banks—secured	-0-
Notes payable to banks—unsecured	3,800.
Notes payable to relatives	-0-
Notes payable to others	-0-
Accounts and bills due	-0-
Unpaid income tax	-0-
Other unpaid tax and interest	-0-
Real estate mortgages payable—add schedule	61,000.
Chattel mortgages and other liens payable	-0-
Other debts—itemize:	
Total liabilities	64,800.
Net worth	220,200.
Total liabilities and net worth	285,000

CONTINGENT LIABILITIES	
As endorser, comaker or guarantor	
On leases or contracts	no
Legal Claims	no
Provision for Federal Income Tax	none
Other special debt	none

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	none
Are you defendant in any suits or legal actions?	no
Have you ever taken bankruptcy?	no

Schedule of Real Estate Owned
Robert Holmes Bell and Helen R.M. Bell, husband and wife

1. 1971 Cimarron Drive, Okemos, Michigan

value $160,000

2. Lot 95, Piatt Lake, Chippewa County, Michigan

value $ 25,000

total value $185,000.

Schedule of Real Estate Mortgage Payable
Robert Holmes Bell and Helen R.M. Bell, husband and wife

Mortgage on 1971 Cimarron Drive, Okemos, Michigan to Union Federal Savings and Loan payable monthly with escrowed taxes.

Balance as of January 1, 1987 $61,000.

JUDICIARY COMMITTEE

87 MAR 17 PM 2:54

AMERICAN BAR ASSOCIATION

Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
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New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L., Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
Washington, DC 20006

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Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
312/988-5701

March 12, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ROBERT H. BELL
United States District Court
Western District of Michigan

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Robert H. Bell for appointment as Judge of the United States District Court for the Western District of Michigan.

Our Committee is unanimously of the opinion that Judge Bell is "Qualified" for this appointment.

Sincerely,

Robert B Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

PHILIP M. PRO

Birth:	December 12, 1946	Richmond, California
Legal Residence:	Nevada	
Marital Status:	Married	Dori Sue Hallas Pro 1 child
Education:	1964 - 1966	Contra Costa Community College A.A. degree
	1966 - 1968	San Francisco State University B.A. degree
	1969 - 1972	Golden Gate University School of Law J.D. degree
Bar:	1972 1973	California Nevada
Experience:	1972 - 1973	Law Clerk to Hon. William Compton, Eighth Judicial District of Nevada
	1973 - 1975	Deputy Public Defender Clark County Public
Defender's Office		
	1975 - 1978	Assistant U. S. Attorney District of Nevada
	1978 - 1979	Semenza, Murphy and Pro Partner
	1979 - 1980	Deputy Attorney General State of Nevada
	1980	Assistant U. S. Attorney District of Nevada
	1980 - present	United States Magistrate District of Nevada
Office:	300 Las Vegas Blvd. Room 457 Las Vegas, Nevada 89101 702 388-6521	

To be United States District Judge for the District of Nevada

ANSWERS TO QUESTIONNAIRE
FOR JUDICIAL NOMINEES

Following are my answers to the Questionnaire for Judicial Nominees provided by the United States Senate Committee on the Judiciary.

1. Full name (include any former names used).

   ANSWER: Philip Martin Pro

2. Address: List current place of residence and office address(es).

   ANSWER: Office: United States Magistrate
   300 Las Vegas Blvd. So., #457
   Las Vegas, Nevada 89101

   Home:
   Las Vegas, Nevada 89119

3. Date and place of birth.

   ANSWER: December 12, 1946
   Richmond, California

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   ANSWER: I am married to Dori Sue (Hallas) Pro. My wife is employed as Office Manager for Bradshaw, Smith and Company, CPA, 2809 W. Charleston Blvd., Las Vegas, Nevada, 89102.

5. Education: List each college and law school you have attended, including dates of attendance, degress received, and dates degrees were granted.

ANSWER:

September 1969 to June 1972	Golden Gate University School of Law 536 Mission Street San Francisco, CA 94105 Juris Doctor Degree (June 4, 1972)
September 1966 to June 1968	San Francisco State University Holloway Avenue San Francisco, CA Bachelor of Arts Degree (Political Science) (June 1968)
September 1964 to June 1966	Contra Costa Community College San Pablo, CA 94806 Associate of Arts Degree (June 1966)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

ANSWER:

October 1980 to Present	United States Magistrate District of Nevada at Las Vegas 300 Las Vegas Blvd. So., #457 Las Vegas, Nevada 89101
January 1980 to October 1980	Assistant United States Attorney District of Nevada at Reno 300 Booth Street Reno, Nevada 89502
January 1979 to January 1980	Deputy Attorney General for the State of Nevada - Gaming Division Carson City, Nevada
January 1978 to January 1979	Semenza, Murphy and Pro Attorneys at Law (Partner) 1885 Arlington Avenue Reno, Nevada
November 1975 to January 1978	Assistant United States Attorney District of Nevada at Las Vegas 300 Las Vegas Blvd. So. Las Vegas, Nevada 89101
October 1973 to November 1975	Deputy Public Defender for the Clark County Public Defender's Office 309 S. Third Street Las Vegas, Nevada 89101
November 1972 to October 1973	Judicial Law Clerk for the Honorable William P. Compton Eighth Judicial District Court Department 2, 200 East Carson Las Vegas, Nevada 89101
December 1968 to August 1969	Claims Adjustor California State Automobile Association Richmond, California

June 1968 through June 1971	After graduation from college, just as I had since junior high school, I continued to work full-time during the summers and part-time during law school at my father's gas station, Leo Pro's Arco, Richmond, CA.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

ANSWER: From January 22, 1964 until October 22, 1968, I served in reserve status in the United States Naval Reserve attaining the rank of Personnelman 3rd Class (E-4). My serial number was 693-55-68 and I was honorably discharged on October 22, 1968.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

ANSWER: Over the years, and particularly in response to my participation in numerous legal and law-related educational activities, I have received various certificates and letters of appreciation. Following is a list of the honors and award of recognition which I think deserve mention in response to Question 8:

During my second year of law school, from 1970 through 1971, I was selected to serve as a member of the Golden Gate Law Review staff. During my third and final year of law school, I was selected as a member of the Board of Editors of the Golden Gate Law Review (1971-72). Additionally, during my third year of law school I was selected as a teaching assistant for the Legal Writing and Research Program for first year law students.

In May 1984, I was the recipient of an award of special recognition by the State Bar of Nevada. (John D. O'Brien, President, State Bar of Nevada 1984, 300 S. Fourth Street, #1009, Las Vegas, Nevada (702) 382-5222.)

In May 1985, I was recipient of the Law Day USA "Liberty Bell" Award, presented by the Clark County Bar Association, Las Vegas. (Mitch Cobeaga, President, Clark County Bar Association, 411 E. Bonneville Avenue, Las Vegas, Nevada (702) 385-3373.)

Award of Recognition from the Closeup Foundation, February 1986. (Phyllis Darling, Local Coordinator, Clark County School District, 2832 East Flamingo Road, Las Vegas, Nevada 89131 (702) 799-5011.)

9. Bar Associations: List all bar associations, legal or judicial related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

ANSWER: My response to Question 9 is provided in two parts. Part A lists all bar associations and legal conferences of which I am or have been a member, and Part B lists the titles and dates of any offices which I have held in such groups:

(A) American Bar Association
October 1969 to date

California State Bar Assocation
December 1972 to date (inactive)

Nevada State Bar Association
October 1973 to date

Clark County Bar Association, Las Vegas
October 1973 to date

Ninth Circuit Court of Appeals
January 1973 to date

United States District Court for the District of Nevada
October 1973 to date

United States Supreme Court
October 1976 to date

Washoe County Bar Association, Reno
1978 to date

American Trial Lawyers Association
1980 to date

Nevada Trial Lawyers Association
1980 to date

National Council of U.S. Magistrates
1980 to date

Nevada Inn of Court
1986 to date

ABA National Conference of Special Court Judges
1983 to date

(B) I was elected Secretary of the National Council of United States Magistrates (1986-1987) at the annual meeting of the NCUSM at New Orleans, Louisiana, June 1986. The NCUSM is the only national body which represents all United States Magistrates through liaison with the Administrative Office of U.S. Courts and is also represented at all meetings of the Magistrates Committee of the Judicial Conference of the United States.

Chairman of the Ninth Circuit Magistrates Conference (1985-1986); elected at the Ninth Circuit Judicial Conference at Tucson, Arizona, 1985. I also served as member of the Executive Committee of the Ninth Circuit Magistrates Conference during 1984-85. As Chairman of the Ninth Circuit Magistrates Conference, which is the official representative body of Magistrates in the Ninth Circuit, I attended all meetings of the Ninth Circuit Judicial Council.

Chairman of the Committee to Revise the Rules of Practice of the United States District Court for the District of Nevada (1983-86). This Committee studied the Local Rules of all Districts within the Ninth Circuit and developed a new set of Local Rules for the District of Nevada which were adopted effective July 1, 1986.

Member of the Ninth Circuit Judicial Council's Jury Instructions Committee - appointed August 1986. This Committee is comprised of Circuit Judges, District Judges, a Magistrate and Lawyer Representatives, and is responsible for the continued development of the Ninth Circuit's Model Jury Instructions.

Member of the Structures Committee of the Ninth Circuit Judicial Conference Executive Committee appointed February 1986. I served as the only Magistrate representative on this particular Committee which, under the supervision of Chief Judge Owen Panner of the District of Oregon, conducted a study of the structure of the Ninth Circuit Judicial Conference in an effort to streamline and improve it.

I have served as State Chairman of the State Bar of Nevada's Annual "Judge Roger T. Foley Law Day Essay Contest" since 1976.

Additionally, I was a member of the Criminal Practice Committee of the State Bar of Nevada from 1974 to 1976, and served as Vice-Chairman of the Continuing Legal Education Committee of the State Bar of Nevada from 1980 through 1985.

In September 1986 I was selected to serve as a Master of the Bench of Nevada's first American Inn of Court, to wit: the Nevada American Inn of Court, and at the organizational meeting in October 1986 was elected Secretary/Treasurer of that professional society.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

ANSWER: I do not belong to any organizations that are active in lobbying before public bodies except to the extent that I am a member and a national officer for the National Council of United States Magistrates which on occasion provides testimony or other information relevant to legislation pending before the Congress of the United States. Following is a list of other civic and educational organizations to which I belong:

Appointed as a member of the States of Nevada's Commission on the Bicentennial of the United States Constitution by Governor Richard Bryan, June 1986.

Selected as a National Delegate to the National Conference of Christians and Jews, New York, New York, October 1986.

Presiding Co-Chairman of the National Conference of Christians and Jews, Clark County Chapter, 1984-86.

Chairman of the National Conference of Christians and Jews Issues in Justice Forum since 1983.

Presiding Judge and Instructor for the United States Attorney General's Advocacy Institute at the United States Department of Justice, Washington, D.C., (1980 to date). The Institute is currently directed by Thomas Schrup, U.S. Department of Justice, Office of Legal Education, Washington, D.C. 20530.

Member of the Administration of Justice Program Advisory Committee for the Clark County Community College, Las Vegas, Nevada, since 1973.

Member, Advisory Committee for the Nevada Youth Constitutional Convention, April 1987.

Member, Southern Nevada Arson Task Force, 1984 to present.

From 1975 to 1976, I served as a member of the Board of Directors of the Clark County Pretrial Release Program.

From 1974 through 1977, I served as a member of the "Corrections Planning Task Force" of the Southern Regional District Allocation Committee (SRDAC-LEAA).

I also served as a member of the Criminal Justice Advisory Commission which reviewed the drafts of the "Comparative Analysis of Nevada Law, Rules and Practice with the ABA Standards of Criminal Justice" edited in December 1974 by Thomas Beatty, Esq., 601 E. Bridger Avenue, Las Vegas, Nevada (702) 382-5111.

11. **Court Admission:** List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

ANSWER: Supreme Court of State of California
December 18, 1972

Supreme Court of State of Nevada
October 10, 1973

Ninth Circuit Court of Appeals
January 2, 1973

United States District Court for the
District of Nevada
October 26, 1973

Supreme Court of United States
October 18, 1976

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

ANSWER:

1. "My Job" article appearing in the August 1985 edition of LV Magazine. This article was written by me for the general public to describe my job as United States Magistrate. A copy of the article is attached hereto.

2. "The Ninth Circuit Magistrates Conference" article written by me for the Bulletin of the National Council of United States Magistrate, December 1985. This article, prepared while I served as Chairman of the Ninth Circuit Magistrates Conference was designed to acquaint all Magistrates outside the Ninth Circuit with the structure and function of the Ninth Circuit Magistrate Conference. Many Magistrates from throughout the United States have expressed an interest in developing a similar conference of Magistrates within their own Circuit. A copy of the article is also attached hereto.

3. Soeder v. General Dynamics Corp, 90 FRD 253 (1980).

4. Newton v. National Broadcasting Company, 109 FRD 522 (1985).

5. United States v. Bergman, 813 F.2d 1027 (9th Cir., 1987).

13. Health: What is the present state of your health? List the date of your last physical examination.

ANSWER: The present state of my health is excellent. I do suffer from mildly-elevated blood pressure, which is corrected to normal with a diuretic called Dyazide. Additionally, I am near-sighted, but my vision is corrected to 20/20 with glasses. The date of my last physical examination is February 24, 1987.

14. Judicial Office (if applicable): State (chronologically) any judicial office you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

ANSWER: Since October 6, 1980, I have served as United States Magistrate for the District of Nevada at Las Vegas. I was appointed to that position pursuant to the Federal Magistrates Act, Title 28, United States Code, Section 631. The jurisdiction of the Court which I serve is fully set forth at Title 28, United States Code, Section 636.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

ANSWER:

(1) Because the vast majority of the Opinions which I have written as a United States Magistrate are not reported Decisions, I have attached as Exhibit B, copies of ten of the most significant Opinions I have written during my tenure as United States Magistrate. Following is a list of the Opinions included in Exhibit B:

Gordon Steely v. General Motors Corp.
CV-S-83-453, HDM
(Opinion issued December 2, 1986 - Appeal pending)

Carson Wayne Newton v. NBC, 35 al.,
Cv-S-81-180, MDC
(Findings and Recommendation issued February 5, 1985, affirmed by District Judge)

AMPICO v. MGM, et al.,
CV-LV-82-26, HDM, and CV-LV 82-96, HDM
(Findings and Recommendation issued December 24, 1985,
affirmed by District Judge)

Horst Schmidt v. Columbia Pictures, et al.,
CV-LV-85-819, LDG
(Order issued April 14, 1986 - no appeal)

Frank Briscoe Company v. Morrison-Knudsen Company, et al.,
CV-LV-80-135, RDF
(Order issued November 18, 1983)

United States v. Spilotro, et al.,
CR-LV-81-92, RDF
(Findings and Recommendation issued September 7, 1982,
affirmed by Ninth Circuit Court of Appeals 800 F.2d 959
(9th Cir. 1986))

United States v. Exber,
CR-LV-81-30, HEC
(Findings and Recommendation issued April 14, 1983,
affirmed District Judge)

United States v. Anthony Spilotro, et al.,
CR-LV-83-115, LDG
(Findings and Recommendation issued June 24, 1985,
affirmed District Judge)

United States v. Kirby Wells, et al.,
CR-LV-85-65, LDG
(Findings and Recommendation issued September 26, 1985,
affirmed District Judge)

United States v. Fernando Fernandez, et al.,
CR-LV-85-10, HDM
(Findings and Recommendation issued January 27, 1986,
affirmed District Judge)

(2) As a United States Magistrate, nearly all of my Opinions address pretrial matters raised in United States District Court. As a result, to my knowledge, none of my decisions as United States Magistrate have been the subject of appellate opinions issued by the Ninth Circuit Court of Appeals except those specified in response to Questions #12 and #15(1), above.

(3) Many of the Opinions I have authored regarding pretrial Motions to Suppress Evidence or to Dismiss Indictments in criminal proceedings pending in United States District Court for the District of Nevada involve federal constitutional issues. The Opinions attached hereto in Exhibit B from criminal cases fairly reflect my rulings in cases involving federal constitutional issues. Additionally, I would supplement my response in this regard to my Opinion regarding the First Amendment and Nevada's shield law, (NRS 49.275), found in Newton v. NBC, 109 FRD 522 (1985).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

ANSWER: Other than the judicial office I now serve as United States Magistrate, I have held no other public offices nor have I ever been a candidate for elective public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates:

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

ANSWER: 1. Following graduation from law school I moved to Las Vegas, and commenced employement in November 1972 as law clerk for the Honorable William P. Compton, Judge of the Eighth Judicial District Court in and for the County of Clark, State of Nevada, 200 East Carson Avenue, Las Vegas, Nevada. I served as law clerk to Judge Compton until October 1973, when, after passing the Nevada Bar examination, I commenced employment as a Deputy Public Defender for Clark County.

2. I have never practiced law alone.

3. Prior to my appointment as United States Magistrate on October 6, 1980, I was connected with the following governmental agencies and law firm:

October 1973 to November 1975	Deputy Public Defender for the Clark County Public Defender 309 S. Third Street Las Vegas, Nevada
November 1975 to January 1978	Assistant United States Attorney District of Nevada at Las Vegas 300 Las Vegas Blvd. South Las Vegas, Nevada
January 1978 to January 1979	Semenza, Murphy & Pro Attorneys at Law (partner) 1885 Arlington Avenue Reno, Nevada

January 1979 to January 1980	Deputy Attorney General for State of Nevada - Gaming Division Carson City, Nevada
January 1980 to October 1980	Assistant United States Attorney District of Nevada at Reno 300 Booth Street Reno, Nevada

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

ANSWER: 1 and 2. A response to question b.1. and b.2. can be best understood by combining my answers thereto in relation to the employment specified in my response to question 17.a.3.

While serving as a Deputy Public Defender for Clark County, Nevada, I defended indigent criminal defendants in the State Courts of Nevada in a wide variety of criminal cases, ranging from murder and rape to trespass and DUI. My duties included all phases of criminal defnese work. from pretrial investigation and preliminary proceedings, through trial and appeal to the Nevada Supreme Court.

While serving as an Assistant United States Attorney on two occasions from November 1975 through January 1978 and June 1980 through October 1980, I represented the United States in a wide variety of criminal prosecutions in United States District Court for the District of Nevada and on appeal in the Ninth Circuit Court of Appeals. I prosecuted a full range of federal criminal cases including fraud, narcotics, perjury, tax, counterfeiting, public corruption, bank robbery and bookmaking. In addition, while serving as Assistant United States Attorney at Reno from January 1980 through October 1980, I was the Assistant in charge of the Reno Office with supervisory responsibility for other AUSAs and staff in the Reno Office. In that supervisory capacity, I reported directly to former United States Attorney B. Mahlon Brown, III, who was based at Las Vegas.

While in private law practice as a partner in the law firm of Semenza, Murphy and Pro from January 1978 through 1979 at Reno, Nevada, I engaged in a general civil and criminal law practice. Although while serving as a Deputy Public Defender and as an Assistant United States Attorney I can safely characterize my typical former clients as indigent criminal defendants and federal governmental agencies, respectively, I cannot provide such a "typical" characterization for my clients while in private practice. They were as varied as the criminal and civil cases which I handled.

While serving as a Deputy Attorney General for the State of Nevada - Gaming Division, I represented the regulatory bodies responsible for regulation of the gaming industry in the State of Nevada, to wit; the State Gaming Control Board and Nevada Gaming Commission, in various administrative and court proceedings relating to the enforcement of the Nevada Gaming Control Act. I also participated in the 1979 Nevada Legislative Session, both as a drafter of legislation and as a witness on behalf of various pieces of proposed Gaming legislation before that body.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

ANSWER: 1. Throughout my practice as a Deputy Public Defender, Assistant United States Attorney, Deputy Attorney General and private practitioner, I appeared in court regularly.

In particular, while serving as an Assistant United States Attorney and Deputy Public Defender, I appeared in court on nearly a daily basis. Additionally, while serving as a Deputy Attorney General, my court appearances were less frequent, but I routinely appeared at administrative proceedings before the State Gaming Control Board and Nevada Gaming Commission.

2. During my tenure as an Assistant United States Attorney my Court appearances were nearly 100% in federal courts. My court appearances while a Deputy Public Defender and in private law practice were exclusively in state courts of record as well as lower municipal courts and justice courts. My appearances while Deputy Attorney General were principally before regulatory agencies, although I also appeared occasionally before state courts of record and federal courts.

3. During my tenure as a Deputy Public Defender, my litigation was 100% criminal. During my tenure as Assistant United States Attorney, my litigation was approximately 95% criminal and 5% civil. During my tenure as a Deputy Attorney General, my litigation was 100% civil. During my tenure in private law practice, my litigation was approximately 70% civil and 30% criminal.

4. and 5. While serving as a Deputy Public Defender from October 1973 through November 1975, I defended 20 felony jury trials. I was sole counsel in 18 of those trials, associate counsel in one and chief counsel in another. I also defended in excess of 75 non-jury misdemeanor trials as sole counsel and appeared in four appellate arguments before the Nevada Supreme Court as sole counsel.

While serving as an Assistant United States Attorney at Las Vegas and Reno, Nevada, from November 1975 to January 1978 and January 1980 to October 1980, I prosecuted 19 felony jury trials to verdict. I was sole counsel in 17 of these cases, chief counsel in one and co-counsel in the other. I also represented the United States the United States in

6 appellate arguments before the Ninth Circuit Court of Appeals as sole counsel. I also prosecuted one non-jury felony trial and several misdemeanor non-jury trials to verdict while serving as an Assistant United States Attorney.

While engaged in private law practice from January 1978 to January 1979, I appeared as sole counsel in two non-jury civil trials and as co-counsel in one non-jury civil trial.

While serving as Deputy Attorney General for the State of Nevada from January 1979 to January 1980, I participated in no jury or non-jury trials. However, I did participate as associate counsel in numerous administrative trial type proceedings before the State Gaming Control Board and Nevada Gaming Commission.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or the judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

ANSWER: It is very difficult to select from the many cases I have litigated prior to my appointment as United States Magistrate, ten that are "most significant". In answering I have tried to focus on ten cases which I consider to be significant for a variety of reasons. Some I consider significant due to their importance to the community, and to the interests of the clients I represented. Others I consider significant because they contributed in some small way to the development of a body of law in a particular area giving them some signficance to the legal community. Still others I consider significant personally as they relate to my development as an attorney. I hope, therefore, that the following will be accepted as my subjective offering:

Case No. 1: State of Nevada v. William Drake Smith, Jr.
8th Judicial District Court
Las Vegas, Nevada

Judge Michael Wendell
200 East Carson, Department VIII
Las Vegas, Nevada
(702) 386-4681

Prosecutor:
Mel Harmon, Chief Deputy District Attorney
200 S. third, 7th Floor
Las Vegas, Nevada 89155
(702) 386-4711

Defense Counsel:
Philip M. Pro, Deputy Public Defender

July 1975

As a Deputy Public Defender, I represented many defendants who were guilty of the offenses charged, and some who were not. In the foregoing case, my client was charged with the crime of armed robbery of a local motel.

I commenced my representation of Mr. Smith immediately after his arrest in the foregoing case and on three other motel robbery charges. At preliminary hearing three of the robbery charges were dismissed when the victims testified that although my client looked somewhat like the perpetrator, he was not the man who had committed the offenses. However, the victim in the fourth case, above, identified my client as the perpetrator of the robbery and he was held to answer for trial.

Predictably, the events at the preliminary hearings persuaded me that my client was telling me the truth when he said he was not guilty of the fourth robbery. When he and an alibi witness both passed polygraph examinations regarding the above robbery case, I was convinced. Nonetheless, the District Attorney's Office declined to dismiss the above charge and the case proceeded to jury trial. Thankfully, my client was acquited by the jury after very brief deliberation.

This case obviously had tremendous significance to my client as well as to me personally. Indeed few experiences as a trial attorney compare with defending a client you know to be innocent of serious criminal charges. The experience made me a better trial attorney both in my capacity as a

Public Defender and later as a federal prosecutor. In addition, this case vividly demonstrated the viability of our American jury system.

Case No. 2: State of Nevada v. Xavier Solarzano:
8th Judicial District Court
Las Vegas, Nevada

District Judge Carl Christensen
200 E. Carson, Department VII
Las Vegas, Nevada
(702) 386-4662

Prosecutors:
Mel Harmon, Deputy District Attorney
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155
(702) 386-4711

Robert Wolf, Deputy District Attorney
(currently in private practice)
302 E. Carson Avenue, #1004
Las Vegas, Nevada
(702) 384-7002

Defense Counsel:
Philip M. Pro, Deputy Public Defender
and
Joseph Bonaventure, Deputy Public Defender
(currently Justice of the Peace)
302 E. Carson, #410
Las Vegas, Nevada
(702) 386-4380

While a Deputy Public Defender, I had the opportunity to serve as co-counsel in the defense of Xavier Solarzano in the above-referenced prosecution for attempted murder. This case was particularly significant, in my opinion, because the entire jury trial was video-recorded by a local television station, and an edited version of the trial was broadcast as a public information and educational program in Southern Nevada the following Summer on three consecutive nights by the local Las Vegas CBS affiliate, KLAS-TV 8. This was the first, and to my knowledge the only television broadcast of a criminal jury trial in the State of Nevada. It is also to my knowledge one of the few such broadcasts ever telecast in the United States.

The issue of television cameras in the courtroom has long been the subject of controversy. As one who believes that the general public is largely unaware of how our criminal justice system operates, I believe the significance of this particular case as a public education vehicle is undeniable, and I was honored to have the opportunity to participate in such a valuable program. This particular case was also the subject of a law review article in the 1977 edition of the Southwest University Law Review.

After a fascinating trial which included a defense of not guilty by reason of insanity, Defendant Xavier Solarzano was convicted of the crime of battery with a deadly weapon, a lesser included offense of the crime of attempted murder. Xavier Solarzano was sentenced to ten years in Nevada State Prison and was paroled after approximately three years. To my best recollection, Mr. Solarzano was last living in the Seattle, Washington, area.

Case No. 3: State of Nevada v. Lloyd Leonard Paulette;
8th Judicial District Court
Las Vegas, Nevada (Case No. 19975)

District Judge Joseph Pavlikowski
200 E. Carson, Department III
Las Vegas, Nevada
(702) 386-4648

Prosecutors:
Mel Harmon, Chief Deputy District Attorney
200 S. Third St., 7th Floor
Las Vegas, Nevada
(702) 386-4711

Lawrence Leavitt, Deputy District Attorney
(currently Attorney in Charge, Las Vegas
Strike Force, Department of Justice
300 S. Fourth Street, #1005
Las Vegas, Nevada 89101
(702) 385-6363

Defense Counsel:
Philip M. Pro, Deputy Public Defender, and
Robert Larsen, Deputy Public Defender
(currently Assistant Public Defender)
309 S. Third St., #226
Las Vegas, Nevada
(702) 386-4685

January 1975

While a Deputy Public Defender I served as lead trial counsel in the defense of Lloyd Leonard Paulette on two murder charges. Defendant Paulette was convicted of both murder charges and received two consecutive life sentences without the possibility of parole. Defendant Paulette's conviction was affirmed on appeal by the Nevada Supreme Court, 545 P.2d 205 (Nevada 1976). While serving his prison sentence, Defendant Paulette was allegedly involved in a subsequent murder of another inmate at Nevada State Prison and is thereafter reported to have committed suicide in his prison cell.

I view this case to be significant largely from a personal standpoint because it taxed by abilities as a trial attorney in the defense of a criminal caes to the utmost. The murders of Eugene and Mary Cerrone, committed by my client and two co-defendants, were extremely brutal and engendered a remarkable amount of adverse pretrial publicity. Numerous complicated legal issues and trial strategy issue were confronted by myself and co-counsel. I also consider this particular case to be significant because of the tremendous assistance I received during the defense of this case from colleagues in the Public Defender's Office which in my view illustrates the viability of Public Defender Offices as providers of effective legal representation for indigent criminal defendants.

Case No. 4: United States v. Daniel Flickinger, et al.,
United States District Court for the
District of Nevada at Las Vegas
CR-LV-75-173, RDF
Affirmed on Appeal at 573 F.2d 1349
(9th Cir. 1978)

United States District Judge Roger D. Foley
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 388-6447

Prosecutor:
Philip M. Pro, Assistant U.S. Attorney

Defense Counsel:
Oscar Goodman, Esq., (for Flickinger)
520 S. Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563

Robert Peccole, Esq., (for Hayduk)
550 E. Charleston Blvd., #5
Las Vegas, Nevada 89104
(702) 383-8332

Jeffrey Sobel, Esq., (for Munier)
330 S. Third, #1070
Las Vegas, Nevada 89101
(702) 386-0397

Albert Freedman, Jr., Esq., (for McLaughlin)
(address unknown)

December 1975

In the first case which I tried as an Assistant United States Attorney, I successfully prosecuted the four defendants in the above-referenced case at a non-jury trial for multiple drug violations under Title 21, United States Code. I cannot recall the names of each of the trial counsel in that case, although I believe they overlap substantially with the above-referenced attorneys who represented the defendants on appeal before the Ninth Circuit. I have included this particular case because I attach significance to the Opinion which was rendered in the Appeal in United States v. Flickinger, 573 F.2d 1349 (9th Cir. 1978), a copy of which is attached hereto.

Specifically, I consider this case to constitute a moderately significant contribution to the body of law concerning the type of "exigent circumstances" which may justify immediate action by police officers to effect a warrantless arrest of individuals in a residence. The Flickinger case has been frequently cited in numerous other cases in the Ninth and other Circuits concerning the subject of "exigent circumstances".

Case No. 5: United States v. James Dean Potter
United States District Court
District of Nevada
CR-LV-75-117, RDF
Affirmed on Appeal at 552 F.2d 901
(9th Cir. 1977)

United States District Judge Roger D. Foley
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 388-6447

Prosecutor:
Philip M. Pro, Assistant U.S. Attorney

Defense Counsel:
Leonard W. Goldstein, Esq.
(last-known address)
P.O. Box 1702
Sauselito, California 94965
(415) 332-9531

Michael D. Bebow, Esq.
(last-known address)
680 Beach Street, Suite 364
San Francisco, California 94109
(415) 441-1540

December 1976

As an Assistant United States Attorney, I successfully prosecuted Defendant Potter at a jury trial for the crime of importation of marijuana in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1). I submit this case as significant because of the challenge made by Defendant in the case to the "Amended Plan" of the United States District Court for the District of Nevada utilized for random selection of grand and petit jurors. As can be seen from the Opinion of the Ninth Circuit Court of Appeals which I have attached hereto, the District of Nevada's "Amended Plan" was upheld at both the trial court and appellate court levels.

This particular case was obviously very important to all criminal prosecutions which occurred in the District of Nevada during the relevant time frame becuase an adverse ruling would have raised a serious question as to the validity of all criminal actions instituted in the District. I also consider the Opinion of the Ninth Circuit Court of Appeals to be significant because it presents a comprehensive analysis of what a federal district must do to comply with the Jury Selection Act of 1968.

Case No. 6: United States v. George V. Kleifgen
United States District Court
District of Nevada
CR-LV-75-55, BRT
557 F.2d 1293 (9th Cir. 1977)

United States District Judge Bruce R. Thompson
300 Booth Street
Reno, Nevada 89509
(702) 784-5424

Prosecutor:
Philip M. Pro, Assistant U. S. Attorney

Defense Counsel:
Paul Sorenson, Esq.
323 S. Las Vegas Blvd.
Las Vegas, NV 89101
(702) 384-9797

Kermitt L. Waters, Esq.
438 E. Sahara Avenue
Las Vegas, NV 89104
(702) 733-8877

Patrick Doyle, Esq. (deceased)

July 1976 at Reno, Nevada

While an Assistant United States Attorney at Las Vegas, I successfully prosecuted Defendant Geroge Kleifgen in Reno, Nevada, for income tax evasion in violation of Title 26, United States Code, Section 7201. Defendant Kleifgen was a well-known Las Vegas physician and a relatively notorious "tax protester" in the State of Nevada who had previously been convicted of Medicare fraud. The variety of legal issues raised on the appeal of that case are reflected in the Opinion which I have attached hereto.

I consider this case to be significant for a couple of reasons. First, it represented to my knowledge the first successful prosecution of a "tax protester" defendant in the District of Nevada for the crime of income tax evasion. (As you no doubt know, the vast majority of "tax protest" convictions generally involve misdemeanor "Willful Failure to File" charges under Title 26, United States Code, Section 7203.) I also consider the case significant because it represents the only case in which I participated as an attorney in which the suggestion was made that I had engaged in any improper form of conduct as counsel.

Specifically, and as can be seen in the Opinion attached hereto at page 1297, Defendant on appeal raised the claim that as prosecuting attorney, I had improperly interviewed Defendant's former attorney, Henry Gordon, prior to trial. This was not accurate, but the trial record was silent on the issue. During oral argument on appeal, I specifically requested of Judge Sneed and the other panel members that if in their view the record below was inadequate to enable the Court of Appeals to reject Defendant's argument on appeal, that they remand the case for further hearing before U.S. District Judge Bruce Thompson so that the record could be made clear that I as prosecutor had engaged in no improper contact with Defendant Kleifgen's former attorney. Judge Sneed did precisely that and a subsequent hearing was conducted before Judge Thompson in Reno at which both Defendant Kleifgen's former attorney, Henry Gordon, and I testified. At the close of said hearing, Judge Thompson made specific Findings that no facts were present to support Defendant's contention of improper contact. Judge Thompson also roundly chastised defense counsel for pursuing an issue which they in good conscience knew was unsupported by facts. Because I was a witness in the subsequent proceeding before Judge Thompson, the Government was represented at that stage by former United States Attorney Lawrence J. Semenza and Assistant United States Attorney Raymond Pike.

Lawrence J. Semenza, Esq.
560 E. Plumb Lane
Reno, NV 89502
(702) 825-6066

Raymond Pike, Esq.
Vice President and General Counsel
International Game Technology
520 S. Rock Blvd.
Reno, NV 89502
(702) 323-5060

Case No. 7: United States v. Maurice Dodson, et al.,
United States District Court for the
District of Nevada
CR-LV-76-172, RDF

United States District Judge Roger D. Foley
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101
(702) 388-6447

Defense Counsel:
Harry Claiborne, 22709-048
Federal Correctional Center
Maxwell AFB, AL 36112

Oscar Goodman, Esq.
520 S. Fourth Street
Las Vegas, NV 89101
(702) 384-5563

Charles McNelis
Washington, D.C.

Patrick Doyle, Esq. (deceased)

Gary Logan, Esq.
101 Convention Center Drive
Penthouse Suite
Las Vegas, NV 89109
(702) 737-5558

J. Ring Smith, Esq.
620 S. Casino Center Blvd.
Las Vegas, NV 89101
(702) 388-0244

Prosecutors:
Philip M. Pro, Assistant U.S. Attorney
and
Kevin O'Malley, Special Attorney
U.S. Department of Justice
(current address unknown)

April 1977

This five week trial involved a major bookmaking prosecution which included the admission of a court-ordered wiretap into evidence for the first time in Nevada's federal courts. This case was particularly significant for me for several reasons. First it taxed my ability as a trial attorney to the utmost. The defense team in this case was excellent, and the legal issues surrounding the crime involved and the admission of the wiretap were complex. I became involved in the case only a few weeks before trial because of the departure from government employment of the Strike Force attorney who had initiated the prosecution. I was joined only two weeks before trial by an inexperienced Strike Force attorney who immediately encountered difficulty relating to defense counsel and the court, thereby causing the vast majority of the prosecution responsibility to fall to me.

Although the defendants in this case were convicted by the jury, a new trial was granted after extensive hearings on the propriety of certain contact between my co-counsel in the case and one of the defense attorneys which had occurred during trial and in which I was not involved. The defendants were acquitted at the retrial of the case, in which I did not participate as I had departed the U.S. Attorney's Office for private law practice.

Case No. 8: United States v. Robert E. (Moon) Mullen;
United States District Court for the
District of Nevada
CR-LV-77-45, RDF

United States Distridt Judge Roger D. Foley
300 Las Vegas Blvd. South
Las Vegas, NV 89101
(702) 388-6447

Defense Counsel:
George Graziadei, Esq.
101 Convention Center Drive
Penthouse Suite
Las Vegas, NV 89109
(702) 731-2711

Clyde Maxwell, Esq.
(current address unknown)

Prosecutors:
Philip M. Pro, Assistant U.S. Attorney
and
Richard Wright, Assistant U.S. Attorney
(currently in private practice)
302 E. Carson Avenue #620
Las Vegas, Nevada 89101
(702) 386-5054

October 1977

This was a seven-week prosecution of former Las Vegas Municipal Court Judge Robert (Moon) Mullen for filing false income tax returns and perjury. The case arose from Mullen's acceptance of bribes from local bail bondsmen and a private investigator and his subsequent perjury before a federal grand jury.

In my opinion, this case was particularly significant to the community because it involved a most serious breach of public trust by a judicial officer and public servant. This case was also, however, personally difficult for me due to my personal admiration for Judge Mullen's accomplishments as the only black Judge in Las Vegas and the balanced treatment he had displayed toward my indigent clients when I had appeared before him years earlier as a Deputy Public Defender. This prosecution drew into very sharp perspective my obligation as an Assistant United States Attorney to prosecute violations of the law without fear or favor. Defendant Mullen's conviction was affirmed on appeal.

Case No. 9: State Gaming Control Board v.
Hotel Conquistador, Inc., dba
Tropicana Hotel and Country Club, et al.,
Before the Nevada Gaming Commission[1]
Deputy Attorney General Philip Pro for
Complainant;
Kirby Wells, Esq., for Respondent
520 S. Fourth Street
Las Vegas, NV 89101
(702) 384-5563

November 1979

During my service as a Deputy Attorney General assigned to the Gaming Division, I had the opportunity to work on a number of major cases which significantly affected the Nevada gaming industry and the State of Nevada's ability to regulate that industry. Such cases included the State Gaming Control Board's highly publicized actions against Argent Corporation and Aladdin Hotel Corporation. However, one of the most significant cases for me was the above-referenced action by the State Gaming Control Board against the Tropicana Hotel.

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[1] The Honorable Harry Reid, United States Senator for the State of Nevada, served as Chairman of the Nevada Gaming Commission during these proceedings.

The significance of this case is due in part to its complexity, including the clear involvement of the Respondent Corporation's with organized crime as evidence by Court-authorized wiretaps in Kansas City and Las Vegas which are now public, and the heavy scrutiny received by the publicly traded Respondent Corporation from the Securities and Exchange Commission. I was assigned the administrative prosecution of this particular case. I thereafter participated in settlement negotiations with members of the State Gaming Control Board and the representatives for the Respondents. In my view, the settlement agreement reached in that case on November 14, 1979, and memorialized in the Order of the Nevada Gaming Commission on November 15, 1979, was significant because it clearly, fairly, and with finality, resolved one of the most troublesome problems faced by the State of Nevada in its effort to effectively regulate the gaming industry.

Case No. 10: State of Nevada, ex rel., Nevada Gaming Commission v. Aladdin Hotel Corporation, 637 F.2d 582 (9th Cir. 1980)[2]

For Respondent:
Albert Kreiger, Esq.
Miami, Florida

Richard Wright, Esq.
302 E. Carson Avenue #620
Las Vegas, NV 89101
(702) 386-5054

Devoe Heaton, Esq. (deceased)

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[2] The Honorable Harry Reid, United States Senator for the State of Nevada, served as Chairman of the Nevada Gaming Commission during these proceedings.

For Plaintiff:
Raymond Pike, Deputy Attorney General
(currently Vice President and General
Counsel for International Game Technology)
520 S. Rock Blvd.
Reno, NV 89502
(702) 323-5060

Patricia Becker, Deputy Attorney General
(currently General Counsel, Harrah's Hotel
Corporation)
Reno, Nevada

William Hammer, Deputy Attorney General
(currently private practice)
610 S. Ninth Street
Las Vegas, NV 89101
(702) 384-1074

Philip M. Pro, Deputy Attorney General

Summer and Fall 1979

During 1979, the Aladdin Hotel Corporation operated a licensed hotel and gaming casino in Las Vegas and various of its officers were convicted on a variety of racketeering charges in United States District Court for the Eastern District of Michigan at Detroit. As a result, the Nevada State Gaming Control Board and Nevada Gaming Commission initiated administrative proceedings to close the Aladdin Hotel's gaming casino and to revoke its gaming license. As a Deputy Attorney General for the Gaming Division, I participated actively as part of the team of attorneys representing the State of Nevada in the revocation proceedings. Under order of the Nevada Gaming Commission, the Aladdin Hotel Corporation was closed. However, the very same day as a result of the action filed in U.S. District Court by the Aladdin Hotel Corporation against the State of Nevada (See 637 F.2d 582, (9th Cir. 1980)), the Aladdin was ordered reopened by the Honorable Harry E. Claiborne, former United States District Judge. There followed several hearings before Judge Claiborne and thereafter an appeal to the Ninth Circuit Court of Appeals which resulted in a very significant ruling by the Ninth Circuit Court of Appeals reinforcing the authority of the State of Nevada to regulate gaming licensees within the State. (A copy of the Opinion in Aladdin Hotel Corporation v. State of Nevada, 637 F.2d 582 (9th Cir. 1980) is attached hereto.)

As a result of the United States District Court Order requiring the State of Nevada to reopen the Aladdin Hotel and Casino during the pendency of the litigation in federal court, I assisted in the development of a "suprevisor" position approved by the Nevada Gaming Commission and the Court to operate the Casino under the supervision of the State during the pendency of Court proceedings. This was the first time such a "supervisorship" had been instituted to operate a casino under State supervision in the State of Nevada.

The necessary development of a "supervisorship" in the Aladdin case prompted the Nevada Gaming Commission to propose legislation which I helped prepare which resulted in the 1979 passage of Nevada Revised Statute Chapter 463B, entitled "Supervision of Certain Gaming Establishments".

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progres to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

ANSWER: I think my responses to many of the foregoing questions fairly represent my involvement in significant legal activities that involved litigation. I would, however, offer three additional areas of legal activity which I think reflect positively on my qualifications to serve as a United States District Judge.

First, although my experience as an attorney from 1972 through 1980 was varied, the majority of my professional life focused on trial work with an emphasis in criminal practice. However, since my appointment as United States Magistrate in October 1980, I have had the opportunity to spend over six years as a judicial officer coping with precisely the same cases with which I will be confronted as a United States District Judge.

The caseload of the District of Nevada, particularly at Las Vegas, is very heavy and diverse. My duties as United States Magistrate have been divided almost equally between civil and criminal cases.

I would direct particular attention to my work as the presiding Magistrate in the MGM Fire Litigation, MDL 453. That case represents one of the largest mass disaster tort cases in United States history and as Magistrate I conducted in excess of 140 hearings in an effort to manage all phases of pretrial discovery.

In the process, I had the opportunity to work with one of the finest United States District Judges in the United States, the Honorable Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania (17613 U.S. Courthouse, Philadelphia, PA 19106, (215) 597-0581). Certainly Judge Bechtle, who is also a member of the Magistrates Committee of the Judicial Conference of the United States, is in an excellent position to comment upon my qualifications to serve as united States District Judge.

Second, although my answers to certain of the questions above reflect my involvement in a variety of law-related and community activities, I do not think they fully reflect the extent to which I have involved myself in legal and community educational activities.

My participation in the Nevada Inn of Court, the State Bar of Nevada Continuing Legal Education Committee and the Attorney General's Advocacy Institute are but a few examples of my commitment to the continued improvement of education of the Bar and the Bench.

Additionally, because I strongly believe that public confidence in our system of justice depends upon public understanding of our Court system and legal process, I have continually involved myself in a variety of educational activities designed to reach various segments of the non-legal community.

In this regard, I have made myself available as a speaker at various service organizations and high schools throughout Nevada and have presided over a variety of mock trials sponsored by the Clark County Bar Association and other groups for the benefit of high school students in my community.

My community activities during the month preceding the submission of this Questionnaire are illustrative of my belief that as a public servant I owe an obligation of involvement in my community.

On April 23, 1987, I addressed approximately 60 senior citizens on the topic, "Judges are People, Too". That same evening, I participated as a speaker at the opening ceremonies of the Nevada Youth Constitutional Convention in Las Vegas. On April 27, 1987, the other Judges of our Court and I each taped 25-second Bicentennial message for local television stations. Throughout the month of April, I have been reviewing over 100 essays submitted by high school students from throughout the State of Nevada in connection with the State Bar of Nevada's Law Day Essay Contest which I have chaired for the past several years. Finally, on Law Day, May 1, 1987, I presided over a mock trial involving approximately 100 high school students from Las Vegas.

Following is a partial list of the Continuing Legal Education Seminars in which I have participated as a faculty member:

Nevada Trial Lawyers Association Seminar on Federal Rules of Civil Procedure, San Francisco, California, October 1986.

Clark County Bar Association Seminar on new Federal Local Rules of Practice - July 1986.

Lecturer at the Practicing Law Institute Seminar regarding Management of Complex Tort Litigation, New York, New York, June 1986.

State Bar of Nevada Convention Seminar Regarding Magistrate's Act, Monterey, California, May 1985.

Washoe County Bar Association regarding Amendments to the Federal Rules of Civil Procedure, 1983.

Lecturer at the Southern Nevada Desert Correctional Institution Street Readiness Program since 1985.

Lecturer regarding the Nevada Gaming Control Act at the "New York Assembly Project Train Program: Casino Gaming Regulations" at th New York Legislature, Albany, New York, sponsored by the National Conference of State Legislators - 1979.

Lecturer for the Clark County School District's Student/Parent Drug Abuse Intervention Program in 1976.

Finally, I submit that my active participation as a member of the Executive Board of the Ninth Circuit Magistrates Conference and as an officer with the National Council of United States Magistrates reflects positively on my qualifications to serve as a United States District Judge. I would hope that contact with any of my fellow United States Magistrates would reflect my dedication to serving as a competent and fair judge.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   ANSWER: None.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   ANSWER: Although I anticipate no conflicts of interests arising after my confirmation as United States Judge, I would resolve such conflicts in compliance with the Code of Judicial Conduct for United States Judges promulgated by the Judicial Conference of the United States, and as that Code may be hereinafter modified. I will do two things to determine potential areas of concern with respect to potential conflicts of interest. First, I will attempt to be conscious of potential conflicts of interest myself and will raise them *sua sponte* when they occur with the parties. Second, I will be sensitive to potential conflict of interest concerns raised by all parties which appear before me.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? Is so, explain.

   ANSWER: No.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   ANSWER: No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   ANSWER: Not applicable.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   ANSWER: Please see the attached Financial Net Worth Statement on the following page.

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	5	000	00
U.S. Government securities—add schedule			-00-
Listed securities—add schedule			-00-
Unlisted securities—add schedule			-00-
Accounts and notes receivable:			
Due from relatives and friends			-00-
Due from others			-00-
Doubtful			-00-
Real estate owned—add schedule	180	000	00
Real estate mortgages receivable			-00-
Autos and other personal property	30	000	00
Cash value—life insurance			-00-
Other assets—itemize:			
Art collection	8	000	00
Individual Retirement			
Account[1]	11	500	00
Total assets	234	500	00

LIABILITIES			
Notes payable to banks—secured[3]	4	100	00
Notes payable to banks—unsecured[4]	3	265	00
Notes payable to relatives			-00-
Notes payable to others			-00-
Accounts and bills due[5]	15	900	00
Unpaid income tax			-00-
Other unpaid tax and interest			-00-
Real estate mortgages payable—add schedule[6]	140	650	00
Chattel mortgages and other liens payable			-00-
Other debts—itemize:			-00-
Balance due to Main			
Street Art, Inc.,			
Orem, Utah, for			
Bronze Sculpture	3	662	00
Total liabilities	167	577	00
Net worth	66	923	00
Total liabilities and net worth	234	500	00

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			-00-
On leases or contracts[2]	8	100	00
Legal Claims			-00-
Provision for Federal Income Tax			-00-
Other special debt			-00-

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

1. IRA's maintained by my wife and myself with Fideltiy Management Trust Company Mutual Funds, Boston, Massachusetts.

2. Auto lease with First Leasing Co., San Leandro, California.

3. Secured loan through Nevada Federal Credit Union, Las Vegas, Nevada.

4. Unsecured signature loans of $2,000 through the Nevada State Employees Federal Credit Union, Carson City, Nevada, and of $1,265 through First Interstate Bank of Nevada, Las Vegas, Nevada.

5. Total is comprised of Mastercard and Visa Bank Card revolving accounts maintained by my wife and myself.

6. Mortgage on my residence through Anchor Mortgage Services, Inc., Wayne, New Jersey.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

   (a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   (b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   (c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   (d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

   (e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

ANSWER:

In my view, our courts provide an important forum for the resolution of disputes between identifiable parties properly subject to the jurisdiction of the court. A judge should strive to resolve each dispute in accordance with the applicable Constitutional, statutory and case precedent, as fairly, quickly and inexpensively as possible.

At the same time, courts must avoid treating a lawsuit as a vehicle for achieving a result beyond that to which the parties before the court are legitimately entitled.

In my experience, the term "judicial activism" is often used to describe the tendency of courts to render decisions on issues that are not properly with the scope of the court's authority or to assume administrative responsibilities which courts may be ill-equipped to discharge. Under such circumstances, courts are in my view subject to legitimate criticism for usurping the role of the legislative and executive branches of government as contemplated under the Constitution.

Judicial legislation, although no doubt well-intended by those who practice it, has in my opinion the potential to frustrate our Constitutional process. It essentially usurps the capacity of the separate legislative and executive branches of government to confront and to develop informed and creative solutions to issues of public policy.

The executive and legislative branches of government are empowered under the Constitution to propose and enact laws, and the members of those branches are accountable to the people under our democratic process. It is within the context of the executive and legislative branches that all aspects of social policy can be most fairly debated. By comparison, judges are not accountable at election time to the public they serve, and courts are less well-equipped to provide a forum for comprehensive debate on issues of public policy.

Additionally, a concept of standing which is too broad, can thrust the courts into areas in which they may not be equipped to provide relief. I consider strict requirements of standing and ripeness to be important concepts which allow only parties with legitimate and identifiable controversies within the jurisdiction of the court to litigate a case.

In my view, every judge must be mindful that his is a position of significant power, and therefore a position of extraordinary responsibility. That judicial power must be exercised with great restraint to resolve only specific disputes properly before the court, in accordance with applicable statutory requirements, case precedent and Constitutional safeguards.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

ANSWER:

As I hope can be seen from my answers to this Questionnaire in general, and in particular with respect to Questions #9, #10, #17, #18 and #19, I believe that the vast majority of my professional and personal life reflects an abiding concern for equal justice under the law.

I have dedicated virtually my entire professional life to the field of public service and in the process have been continually active in legal and community education.

Naturally, my work as a Deputy Public Defender represents in a literal sense numerous occasions on which I have provided representation to the disadvantaged. However, I hope that my entire career and my community involvement has reflected my commitment to the belief that all individuals are entitled to equal justice under the law in this country.

During the nearly seven years I have served as United States Magistrate for the District of Nevada, I have endeavored not only to be an honest, capable and hard-working judicial officer, but have also attempted to display those attributes to litigants and counsel who have appeared before me. In my view, confidence in our judicial system requires not only the fact of equal treatment, but the appearance of equal treatment such that all parties who appear before the court leave with the view that they have been treated fairly regardless of whether they have won or lost their case.

As United States District Judge for the District of Nevada I will continue to demonstrate that commitment to equal justice under the law.

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
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Chicago, Illinois 60611
(312) 988-5000

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and Member-at-Large
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Denver, CO 80203

ELEVENTH CIRCUIT
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Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
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May 6, 1987

RECEIVED MAY 08 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: PHILIP M. PRO
United States District Court
District of Nevada

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Philip M. Pro for appointment as Judge of the United States District Court for the District of Nevada.

Our Committee is unanimously of the opinion that Mr. Pro is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske
ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

ROBERT F. KELLY

Birth:	June 17, 1935	Rosemont, Pennsylvania
Legal Residence:	Pennsylvania	
Marital Status:	Married	Patricia Henkel Kelly 4 children
Education:	1953 - 1957	Villanova University B.S. degree
	1957 - 1960	Temple University School of Law LL.B. degree
Bar:	1961	Pennsylvania
Experience:	1961 - 1962	Private Practice Media, PA
	1962 - 1964	Private Practice Chester, PA
	1964 - 1972	Law Clerk to Hon. Francis Catania Court of Common Pleas Delaware County (part-time)
	1964 - 1976	Private Practice Media, PA
	1972 - 1976	Prothonotary of Delaware County
	1976 - present	Judge, Court of Common Pleas 32nd Judicial District of Pennsylvania
Office:	Court House Media, Pennsylvania 19063 215 891-4498	

To be U. S. District Judge for the Eastern District of Pennsylvania

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Robert F. Kelly

2. Address: List current place of residence and office address(es).

Home -

Office - Delaware County Court House
Media, Delaware County, Pennsylvania 19063
Telephone - 215-891-4498

3. Date and place of birth.

June 17, 1935 - Rosemont, Pennsylvania

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Married to the former Patricia J. Henkel
My wife is a homemaker and student at Villanova University Law School, Villanova, Pennsylvania.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Villanova University - 1953 to 1957 - B.S. Economics
Deans Honor List

Temple University School of Law - 1957 to 1960 - L.L.B.

National Judicial College, Reno, Nevada - 4 week Summer Session - 1978

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

January 1976-Present - Judge, Court of Common Pleas of Delaware Co
Court House, Media, PA.

January 1972-January 1976 - Prothonotary of Delaware County
Court House, Media, PA.

December 1963-January 1972 - Law Clerk to Judge Francis J. Catania
Court House, Media, PA.

December 1963-January 1976 - Attorney at Law - Self Employed
9 West Front Street, Media, PA.
(for verification, contact -
George E. Kearns, Jr., Esq.
9 West Front Street, Media, PA.
Phone - 215-566-7000)

1979-Present - Villanova University Law School - Lecturer in Law
Villanova, PA.
Prof. Leonard Packel
Phone - 215-645-7084

March 1962-December 1963 - Louis A. Bloom - Law Practice
Attorney at Law
Fidelity Building
Chester, PA.
Phone - 215-891-4349

September 1961-March 1962 - George E. Kearns, Jr. - Law Practice
Attorney at Law
9 West Front Street
Media, PA.
Phone - 215-566-7000

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have never been in the military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

In 1986, I was awarded a certificate from the National Institute For Trial Advocacy for taking part as a Trial Judge in their Mid-Atlantic Program. I have taken part in these programs every year since 1983 and I am scheduled to again participate in March of 1987.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Pennsylvania Bar Association
American Bar Association
Delaware County Bar Association
American Judiciature Society
Pennsylvania Trial Judges Association

I was an active member of the Delaware County Bar Association's Committee to redraft the Local Rules of Court.

In the summer of 1985, I took part in a Delaware County Bar Seminar. I have a one hour talk on "Preservation of Trial Error For Appeal."

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

I am not a member of any organization that is active in lobbying before public bodies.

I hold membership in the Greater Philadelphia Dahlia Society, 406 Franklin Avenue, Cheltenham, PA. and Delaware County Field and Stream Association, Box 1092, Brookhaven, PA.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Delaware County Court of Common Pleas - March 17, 1961
Supreme Court of Pennsylvania - January 14, 1963
Federal District Court, Eastern District of Pennsylvania - March 17, 1972

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Over the past eleven years, I have had many Opinions published in the Delaware County Law Journal. Other than that, I have not had any material published.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent - February 18, 1987

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I am presently a Pennsylvania State Trial Judge. I was elected to that office in November of 1975 for a ten year term. At the expiration of that term, I stood for retention and was retained for an additional ten year term in November of 1985. This is a Court of general unlimited jurisdiction.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

Copies of these opinions will be provided on request.

Re: Number 15 (1)

Commonwealth v. Roden, 3496-81.

Commonwealth v. Taraschi, 1289-81, 70 Del.Co. 104 (1982).

Commonwealth v. Forcino, 1521-81.

Commonwealth v. Cimerose & Moore, 719-81, 717-81.

Commonwealth v. Florio, 7075-82, 71 Del.Co. 347 (1984).

Commonwealth v. Keenan, 94-81.

Commonwealth v. Donahue & Smythe, 8-81, 9-81.

Commonwealth v. Yarris, 690-82.

Commonwealth v. Pless, 2119-81, 2473-81, 5836-81, 31 D.&C. 3d 475 (1981).

Groover v. Lecher, 81-2989, 83-9660.

Re: Number 15 (2)

Sun Oil Company of Pennsylvania v. Thomas E. Banghart, 479 Pa. 234, 308 A.2d (1978).

Lessor of services station brought action in ejectment against lessee. Lessee petitioned for review of allowance of special supersedeas by the Superior Court at No. 563 October Term, 1977, reversing the Court of Common Pleas-Civil Division, Delaware County denying lessee possession of premises. The Supreme Court, No. 315 Miscellaneous Docket No. 21, Manderino, J., held that 30-day period from entry of order appealed from within which to file security to stay execution of order was tolled during time that supersedeas order had been rendered ineffective by appellate court's reversal of supersedeas order; lessee's petition for review of supersedeas order was timely filed.

Commonwealth of Pennsylvania v. Frederick Robert Frey, 258 Pa. Super. 288, 392 A.2d 798 (1978).

Defendant was convicted of possession of stolen automobile, possession of automobile with defaced serial number, and sale of stolen automobile and defendant appealed. The Superior Court, No. 1149 October Term, 1977, Cercone, J., held that where theft of automobile occurred in another state, and defendant and ultimate purchaser of car lived outside Delaware County, and where document of title of stolen automobile was notarized by Delaware County, notary public, Delaware County Court of Common Pleas erred in assuming jurisdiction based on inference that document of title was notarized in Delaware County.

Marie DeFeo v. Robert MacIntyre, 265 Pa. Super. 95, 401 A.2d 818 (1979).

After landlord obtained default judgment against tenant, tenant filed petition to open or strike judgment and stay execution nunc pro tunc. The Court of Common Pleas, Delaware County entered order that default judgment be "stricken," and landlord appealed. The Superior Court, No. 612 October Term, 1978, Price, J., held that: (1) there was no requirement of notice to tenants of their right to appeal district justice's judgment to the Court of Common Pleas within 20 days, and (2) order striking judgment was improper where alleged defect in original judgment did not appear on the face of the record.

Commonwealth of Pennsylvania v. Frederick C. Erb, 286 Pa. Super. 65, 428 A.2d 574 (1981).

Defendant appealed from judgment of sentencing following his conviction of bigamy. The Superior Court, No. 2629 October Term 1979, Spaeth, J., held that: (1) trial court did not exceed its authority or abuse its discretion in sentencing defendant to make restitution to complainant, and (2) trial court was not free to delegate to agency the amount and manner of restitution.

Commonwealth of Pennsylvania v. Thomas L. Phillips, 286 Pa.Super. 250, 428 A.2d 977 (1980).

Defendant was convicted of burglary and of criminal attempt burglary, and defendant appealed. The evidence at trial showed that a police officer approaching the scene of a burglary observed a white male wearing a shirt with the number "34" on it running away from the building. A few minutes later the Defendant was arrested about four blocks away with a shirt with the number "34" on it around his neck. The Superior Court, No. 391 October Term, 1979, held that evidence was insufficient to sustain conviction.

Commonwealth of Pennsylvania v. James Hamm, 301 Pa. Super 266, 447 A.2d 960 (1982).

Defendant was convicted of possession of firearms without license, possession of instruments of crime and criminal conspiracy, and he appealed. The evidence showed that the Defendant was operating a car that belonged to his girlfriend with two passengers. There was a .38 caliber pistol under the driver's seat and one passenger passed a .22 caliber pistol from the back to the front seat while the police observed him. The Superior Court, No. 877 Philadelphia 1981, Spaeth, J., held that: (1) evidence was insufficient to sustain defendant's convictions of possession of firearms without license and possession of instruments of crime, and (2) evidence was insufficient to demonstrate that defendant had conspired to possess weapons or had committed an over act in furtherance of any other conspiracy.

Commonwealth of Pennsylvania v. Floyd Santner, M.D., 308 Pa. Super. 67, 454 A.2d 24 (1982).

Defendant was convicted of dispensing controlled substances to drug dependant persons and dispensing said substances not in good-faith course of professional conduct, and he appealed. The Superior Court, No. 2361 Phila.1980, Spaeth, J., held that search warrants were overbroad.

Commonwealth of Pennsylvania v. Edward A. Walsh, 314 Pa. Super. 65, 460 A.2d 767 (1983).

Appeal was taken by the Commonwealth from order of the Court of Common Pleas of Delaware County, Criminal Division suppressing evidence in a criminal prosecution. The Superior Court, No. 1512 Philadelphia 1980, Brosky, J., held that consent given by defendant to warrantless search in form of blood alcohol test at hospital following fatal collision was voluntary where Defendant was given ample notice that result was be used for criminal investigation purposes.

Commonwealth of Pennsylvania v. Carl Macolino, 503 Pa. 201, 469 A.2d 132 (1983).

Defendants were convicted of conspiracy and possession cocaine with intent to deliver and they appealed. The Superior Court, Nos. 668 and 669 Philadelphia Term, 1981, 302 Pa. Super. 96, 448 A.2d 543, held that the evidence was insufficient to sustain the convictions, and the Commonwealth appealed the reversal of the judgment of sentence as to one defendant on the possession charge. The Supreme Court, No. 104 E.D. Appeal Docket 1982, McDermott, J., held that constructive possession could be found in one defendant when both husband and wife had equal access to an area where the contraband was found.

Commonwealth v. Ida Beauford, et al, 327 Pa. Super 253, 475 A.2d 783 (1984).

Defendants were convicted of lotteries and gambling. One Defendant was also convicted of poolselling and bookmaking. In addition, one defendant was convicted of possession of a controlled substance and another defendant was convicted of both possession and possession with intent to deliver a controlled substance. They appealed from judgments of sentence entered in the Court of Common Pleas, Delaware County, Criminal Division at Nos. 1198-81, 1523-81, 1197-81, 1199-81, 1521-81 and 1522-81, Jerome, Levy, Kelly and McGovern, JJ. On consolidation of their direct appeals, the Superior Court Nos. 3351 Philadelphia 1981 and 247, 1136, 1763, 1798 and 2666, Philadelphia 1982, Cirillo, J., held that: (1) technical differences between a pen register and dialed number recorder are immaterial under Wiretapping and Electronic Surveillance Control Act as neither technically permits "aural acquisition of the contents" of any communication, (2) an individual's expectation of privacy in telephone numbers he calls is reasonable, legitimate, and is protected by the State Constitution against government surveillance and intrusion without probable cause, and thus installation and use of pen registers and dialed number recorders by law enforcement authorities is limited to those situations in which an order issues upon probable cause.

In re: Alexander, 260 Pa. Super. 371, 394 A.2d 597 (1978).

Applicant, an ex-convict, appealed from order of Court of Common Pleas, Delaware County, denying his petition to change his name. The Superior Court, No. 297 October Term, 1978, Hoffman, J., held that court order, which based its denial of petition for change of name on unproven assertion by Commonwealth that change of name would be detrimental to law enforcement records and might, therefore, be harmful to public, would be reversed and remanded for evidentiary hearing on allegedly detrimental effect of applicant's change of name.

Commonwealth of Pennsylvania v. James McIntosh, 328 Pa. Super. 255, 476 A.2d 1316 (1984).

Defendant was convicted of robbery, theft by unlawful taking, recklessly endangering another person, terroristic threats, possession of firearms without a license, committing crimes with firearms, and criminal conspiracy, and he appealed. The Superior Court, No. 925 Philadelphia, 1982, Lipez, J., held that: (1) in-court identifications of defendant by five different witnesses were properly admissible, despite fact that all of the witnesses had been shown a photographic array, including a picture of defendant, without the presence of defendant's counsel; (2) variance between information, which charged defendant with conspiracy to commit robbery with a specific person, and proof adduced at trial, which showed only that defendant conspired with persons other than the one named in the information, required reversal of the conspiracy conviction; and (3) defendant's sentences would be vacated and remanded, where it appeared that the invalid conspiracy conviction may have influenced the sentence on one or more of the other convictions.

Commonwealth v. Forcino, 1521-81, 327 Pa. Super. 253, 475 A.2d 783 (1984).

Commonwealth v. Kirlin, 1227-83, ___ Pa. Super. ___, 509 A.2d 1321 (1986).

Commonwealth v. Eells, 2823-83, 71 Del.Co. 370, 30 D.&C. 3d 645 (1984), 346 Pa. Super. 632, 499 A.2d 399 (1985).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I was Prothonotary of Delaware County from 1972 to 1976. I was elected to that post for a term of four years.

I have never been an unsuccessful candidate for elective office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I was a law clerk to Judge Francis J. Catania, in the Court of Common Pleas of Delaware County, Pennsylvania, from January 1964 to January 1972.

This was a part-time position and, all during that time, I was allowed to maintain a separate private law practice.

2. whether you practiced alone, and if so, the addresses and dates;

I was associated with George E. Kearns, Jr. at 9 West Front Street, Media, Delaware County, Pennsylvania from 1961 to 1962.

From 1962 to 1964, I was associated, in the practice of law, with Louis A. Bloom in Chester, Delaware County, Pennsylvania.

From 1964 to 1966, I was a sole practitioner at 113 North Olive Street, Media, Delaware County, Pennsylvania.

From 1966 to 1976, when I ascended the bench, I was associated, in the practice of law, with George E. Kearns, Jr., 9 West Front Street, Media, Delaware County, Pennsylvania.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Same as 2.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My practice consisted mainly of criminal, negligence, divorce and decedent's estates. The character of my practice basically did not change over the years although, as time went by, I did develop a better estate practice.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My typical clients consisted of small businessmen and middle class individuals.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I would say that I appeared in court frequently.

2. What percentage of these appearances was in:

(a) federal courts;	05%
(b) state courts of record;	90%
(c) other courts.	05%

3. What percentage of your litigation was:

(a) civil;	40%
(b) criminal.	60%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I would estimate approximately 45 cases. This is a very difficult figure to arrive at since I do not have complete records in my possession. I have included, in this number, only those cases where I was sole counsel. I would estimate that there would be an additional 10 cases where I was associate counsel.

5. What percentage of these trials was:

(a) jury;	50%
(b) non-jury.	50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA	: CIVIL ACTION
VS.	:
EVELYN P. DOANE, Individually and as Administratrix of the Estate of ISAAC THOMAS DOANE, deceased, and NATHANIEL DOANE, IRIS DOANE, MARY MOORE, ELSIE MORRIS, ELLEN BELL STEVENSON and ELEANOR CHURCH	: NO. 71-1186

Consolidated With

EVELYN P. DOANE	: CIVIL ACTION
VS.	:
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA	: NO. 71-850

Attorney for the Plaintiff, Prudential Insurance Company of America
Peter C. Paul, Esquire, 211 S. Broad Street, 15th Floor,
Philadelphia, PA. 19107
Telephone Number - 215-875-4087

Attorney for Plaintiff-In-Interpleader,
Leonard B. Gordon, Esquire, 3030 PSFS Building
Philadelphia, PA. 19107
Telephone Number - 215-923-2295

Attorney for Defendant-In-Interpleader
Robert F. Kelly, Esquire

Trial Judge - J. William Ditter, Jr.
6614 United States Courthouse
Independence Mall West, 601 Market Street
Philadelphia, PA. 19106
Telephone Number 215-597-9640

Re: The Prudential Ins. Co. of America v. Evelyn P. Doane, et al

On October 16, 1970, the Plaintiff-In-Interpleader (Evelyn P. Doane,) inflicted on the Decedent, Isaac T. Doane, a gunshot wound of the left thigh causing death by exsanguination. The Plaintiff-In-Interpleader was indicted for Murder, Voluntary Manslaughter and Involuntary Manslaughter and after a trial by Judge and Jury, she was acquitted of the Murder and Voluntary Manslaughter charges but found Guilty of Involuntary Manslaughter.

Evelyn P. Doane was designated as the beneficiary on certain insurance policies on the life of Isaac T. Doane. I represented the brothers and sisters of the Decedent and claimed the proceeds of the insurance policies on behalf of his estate. It was our contention that the named beneficiary could not receive the proceeds of the insurance policies on the life of Isaac T. Doane because she was the slayer as defined by the PENNSYLVANIA SLAYERS ACT of 1941, P. 816, 20 PS Sec. 3441 et seq.

As I recall, trial began on May 31, 1972 and continued for approximately three days at which point the matter was settled. Under the settlement, the contending parties agreed to divide the proceeds equally, 50-50.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MORAN AND ALICE MORAN his wife, AND MARINE SERVICES, INC. T/A HUEBER LAUNCH SERVICE	:	CIVIL ACTION
vs.	:	
MELVIN R. LAIRD, SECRETARY OF DEFENSE AND THOMAS R. COLEMAN	:	NO. 72-1236

Trial Judge - Clarence C. Newcomer
13614 United States Courthouse
Independence Mall West, 601 Market Street
Philadelphia, PA. 19106
Telephone Number 215-597-7847

Assistant United States Attorney - Sullivan Cistone, Esquire
(cannot locate)

Attorney for Plaintiff - Robert F. Kelly, Esquire

Sometime shortly before June 26, 1972, I was contacted by a friend and fellow attorney, James A. Cochrane, and asked to represent a client of his, William Moran, in an action to prevent the United States Government from selling property which he claimed belonged to him. It appeared that the United States Government, through the Corps of Engineers, had solicited bids for certain property containing a pier into the Delaware River from the Borough of Marcus Hook in Delaware County, Pennsylvania. The bids were scheduled to be opened on June 26th and it was necessary that a temporary restraining Order be obtained in order to prevent the opening of bids and the additional confusion that would result in the event a bid was accepted creating rights in third parties. Mr. Cochrane asked me to take the case because he had very little experience with the Federal Courts. I filed a Complaint and A Request for a Temporary Restraining Order. As I recall, a hearing was held before the Honorable Clarence C. Newcomer, on or about June 26, 1972, at which time we established preliminarily that title to the property was in the name of Plaintiff Moran and further that the particular wharf in question had never been deeded to the United States Government. The case was of some interest because title to this property had to be established by certain ancient documents that we had obtained including local history books which referred specifically to this wharf in question.

At the conclusion of the hearing, either the Court issued the Temporary Restraining Order or the Assistant Attorney General agreed, voluntarily, to not open the bids that had been solicted for this property because he was convinced, after hearing the testimony, that there was a serious question as to the ownership of the property. My file is not complete because I see from a letter in it that I returned the major portion of the file to James A. Cochrane on October 9, 1972. It is my recollection that, after this initial hearing, the United States Government abandoned its claim of ownership to the property.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA, PENNSYLVANIA
CRIMINAL COURT

COMMONWEALTH OF PENNSYLVANIA	:	NO. 1776
	:	
VS.	:	
	:	
JOHN J. CLEMSON	:	September Term 1972

Trial Judge - Fred W. Davis (Retired-Specially Presiding)
(Now Deceased)

Assistant District Attorney - Babette Josephs, Esquire
328 S. 15th Street
Philadelphia, PA. 19102
Telephone Number - 215-732-3539

Attorney for Defendant - Robert F. Kelly, Esquire

The Defendant, John J. Clemson, was charged with Burglary and Receiving Stolen Property. It appeared that the custodians of the Franklin Institute, on August 20, 1972, noticed the disappearance of four antique rifles ranging in age from 120 to 150 years old. Based on information received, detectives from the Philadelphia District Attorney's Office obtained a search warrant for the Defendant's home. Prior to approaching Clemson's apartment, the detectives obtained a key to the apartment from the manager of the apartment complex. One of the detectives knocked on the apartment door and announced "Police, we have a search warrant." The detective knocked a second time and again announced his identity and purpose. Following the second knock, the detectives waited ten seconds, and then used the passkey to gain entrance to the apartment. Upon entering, the police observed the Defendant's wife emerging from one bedroom and the Defendant's daughter asleep on the living room couch. The detectives discovered the four antique rifles wrapped in a blanket under the Defendant's bed. The Defendant was not present.

A Motion to Suppress the Evidence was filed on the behalf of the Defendant alleging that the police improperly executed the search warrant in that they did not provide the occupants of the apartment with sufficient opportunity to voluntarily surrender the premises before entering forcefully. The Motion to Suppress was denied by the Trial Judge. The case went to trial on November 14, 1972 and a verdict was returned November 15, 1972, finding the Defendant Guilty of Receiving Stolen Property.

After the Court imposed sentence, an Appeal was taken to the Superior Court of Pennsylvania. On April 22, 1975, that Court reversed the finding of the Trial Court and Suppressed the Evidence. Commonwealth v. John Clemson, 234 PA. Super. 191, 388, A2d 649 (1975). Allocatur refused September 12, 1975.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NOS. 1004 and 1007
:
VS. :
:
CRAIG SPANGRUD : September Session 1974

Trial Judge - Domenic D. Jerome
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4336

Attorney for the Commonwealth - William H. Ryan, Jr., Esquire
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4161

Attorney for Defendant - Robert F. Kelly, Esquire

Trial was held on February 26, 1975.

The Defendant was charged with Simple Assault, Aggravated Assault, Terroristic Threats and Endangering Another Person. He was found Not Guilty in a Bench Trial of Aggravated Assault, Terroristic Threats and Endangering Another Person and Guilty of Simple Assault.

Post Trial Motions were filed and Argued after which the Court Sustained the Defendant's Motion In Arrest of Judgment on the remaining charge of Simple Assault on December 1, 1975.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

HAROLD COPPOCK, : NO. 12662 of 1967
Plaintiff :
:
VS. :
:
ELIZABETH HARPER COPPOCK, :)
Defendant : IN DIVORCE AVM
:

Trial Judges - Howard F. Reed
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4489

John V. Diggins
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4527

Attorney for Plaintiff - Olan B. Lowrey, Esquire
Temple College of Law
1719 N. Broad Street
Philadelphia, PA. 19122
Telephone Number - 215-787-7827

Attorney for Defendant - Robert F. Kelly, Esquire

This was a divorce case started in 1967 by the Plaintiff's husband and continued into and beyond 1973. There was a Master's Report filed on March 30, 1970 recommending that the Plaintiff's Request for a Divorce be denied.

The Master held hearings on December 18, 1968, March 5, 1969, June 27, 1969, July 21, 1969, July 22, 1969, August 1, 1969 and September 11, 1969.

In addition, there were hearings before The Honorable Howard F. Reed on Defendant's Application for Alimony Pendente Lite, counsel fees and costs and before The Honorable John V. Diggins on the Defendant's Motion to Discontinue The Divorce Action after the Master's Report was filed recommending that the divorce be denied.

Judge Diggins wrote an Opinion on April 11, 1973, denying the Plaintiff's request to discontinue the case in which he stated, "This is a divorce case begun in 1967 by the husband plaintiff and contested from the beginning. The record is one of, if not the most voluminous, of any divorce case in this county." The Plaintiff attempted to discontinue the case in Delaware County in order to start a new suit for divorce in the State of Wisconsin. The Defendant followed the Plaintiff to the State of Wisconsin where she attempted to obtain support from him. The ultimate outcome of the Wisconsin proceeding is not known.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

CHARLES R. CARROLL, Plaintiff	:	NO. 1124
VS.	:	SEPTEMBER TERM, 1962
DONALD T. HUDOME Defendant	:	IN TRESPASS

Trial Judge - William R. Toal, Sr. (Deceased)

Attorney for Defendant - Robert B. Surrick, Esquire
223 North Monroe Street
P.O. Box 2022
Media, PA. 19063
Telephone Number - 215-565-7080

Attorney for Plaintiff - Robert F. Kelly, Esquire

This case was referred to me by John J. Cahill, Jr., Esquire, 2024 Three Penn Center, Philadelphia, PA. 19102. Telephone Number 215-564-4606. I prepared all of the pre-trial material and was the sole attorney who tried the case.

This was suit for personal injuries arising out of an accident between the Defendant, who was operating a motor vehicle, and the Plaintiff, who was walking along a dark, undeveloped section of roadway in a suburban community. The Plaintiff recovered a verdict for his personal injuries after a two day trial which commenced on April 27, 1964. No Appeal was taken by the Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	NO. 72-83
	:	
VS.	:	
	:	
EDWARD MONTGOMERY, JR.	:	

Trial Judge - John P. Fullam
15614 United States Courthouse
Independence Mall West, 601 Market Street
Philadelphia, PA. 19106
Telephone Number 215-597-0436

Assistant United States Attorney - Henry J. Horstmann, Esquire
100 N. 20th Street, Suite 309
Philadelphia, PA. 19106
Telephone Number 215-864-5391

Attorney for Defendant - Robert F. Kelly, Esquire

In the above case, the Defendant was charged with causing to be transported in Interstate Commerce Travelers Cheques bearing forged counter-signatures and cashing the same in Folcroft, Delaware County, Pennsylvania knowing that said Travelers Cheques would thereafter be transported through banking channels in Interstate Commerce. The cheques in question had been reported stolen in a burglary of a home in Weathersfield, Connecticut on December 9, 1970.

The trial before Judge and Jury was held on April 10 and 11, 1972. the Jury returned a verdict of Not Guilty on all charges.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NOS. 421 and 422
	:	
VS.	:	
	:	
WENDELL GANS	:	September Session 1965

Trial Judge - Edwin E. Lippincott, II (Retired)
459 Kirk Lane, Media, PA. 19063
Telephone Number - 215-566-5558

Assistant District Attorney - Vram Nedurian, Jr., Esquire
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4208

Attorney for Defendant - Robert F. Kelly, Esquire

On September 15, 1965, the Defendant, Wendell Gans, was indicted for Indecent Assault and Rape which was alleged to have occurred on September 21, 1964. The case was tried before a Judge and Jury on January 11 and 12, 1966. The Defendant was found Not Guilty on all charges.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : NOS. 148, 149 and 150
:
VS. :
:
JOHN E. JOHNSON : March Sessions, 1967

Trial Judge - Louis A. Bloom
Delaware County Court House
Media, PA. 19063
Telephone Number 215-891-4349

Attorney for the Commonwealth - Francis K. Risko, Esquire (Deceased)

Attorney for Defendant - Robert F. Kelly, Esquire

The Defendant was charged with Burglary, Assault with Intent to Ravish and Rape. It was alleged that the Defendant assaulted and raped the victim in her own home.

The case involved questions of identification testimony.

Trial was held April 10, 1967. The Jury returned a verdict of Guilty on all charges. Post-trial Motions were filed but later withdrawn and the Defendant was sentenced.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

RAYMOND M. BORLAND, JR. and : NO. 4831-70
ELEANOR D. BORLAND, his wife, :
Plaintiffs :
:
VS. :
:
WILLIAM SWEIGART and :
RUTH SWEIGART, his wife, :
Defendants : IN ASSUMPSIT

Trial Judge - Louis A. Bloom
Delaware County Court House
Media, PA. 19063
Telephone Number - 215-891-4349

Attorney for Plaintiff - Jack Brian, Esquire
(address unknown)

Attorney for Defendant - Robert F. Kelly, Esquire

On April 1, 1966, Plaintiffs and the Defendants signed a written agreement whereby Plaintiffs agreed to sell and Defendants agreed to buy a 1.822 acre property situate in Delaware County, Pennsylvania. Thereafter, the Defendants refused to make the down payment called for in the agreement and Plaintiffs filed suit for breach of contract. The Defendants contended that they were defrauded as to the condition of the premises. The Defendants alleged that the Plaintiffs intentionally concealed extensive termite and insect damage to the woodwork throughout the house.

A Jury Trial was held on November 8 and 9 of 1971 after which a verdict was rendered in favor of the Plaintiffs in the sum of $2,000.00. This was less than the amount demanded in the suit filed by Plaintiffs.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

In 1975, as Chairman of the Delaware County Republican Executive Committee, I redrafted the by-laws of that organization to provide for a more democratic selection of candidates.

See attached Editorial from the March 6, 1975, News of Delaware County.

EDITORIALS

26—News of Delaware County, Thurs., Mar. 6, 1975

The Great Republican Self-Improvement Move

Delaware County Republicans have come a long, long way in one year, out of the wilderness of Machine Politics and into the Promised Land.

The Promised Land, in case you've missed the last six weeks or so, are the new party by-laws, by which candidates for the May primary were endorsed Sunday night.

Playing the part of Moses in this very necessary journey was Bob Kelly — and for his part, the county GOP owes him a deep debt of gratitude.

Kelly, chairman of the Republican Executive Committee, worked tirelessly for months while spearheading the effort to draft a new party structure. The end result of that work—the by-laws adopted last month by committeepersons at a special convention — led to the disbanding of the War Board and the participation of precinct workers in selecting candidates.

The changes called for in the by-laws are already apparent, and they are impressive.

The slate organization Republicans will be fielding in the primary is topped by Charlie Keeler, the attorney who headed the county Government Study Commission, and State Rep. Faith Whittlesey, who entered the running at the last minute after Radnor Commissioner Bud Haabestad — another top-notch possibility — dropped out.

Candidates of the quality and capabilities of Keeler and Whittlesey were few and far between during the old War Board days. And getting a candidate pairing like that — well, that was the stuff political dreams once were made of in Radnor and the other more progressive towns.

Other candidates on the endorsed slate — including Kelly himself, for a judgeship — are in many cases far superior to the average of past years; and in no case are they any worse than some of the clinkers the War Board once fielded for various unfortunate reasons.

After the nominations were completed Sunday, most politicos in attendance seemed quite pleased with the new system, and with themselves. There were dissenters, of course; Jim Aurino, who was bypassed for a commissioner nod, spoke bitterly of how the War Board was "more powerful now than it ever was, because it got rid of the image." But any serious observer of county politics would have a hard time buying that rather emotional analysis of what has transpired.

And here's what HAS transpired: The county Republican party, by adopting new by-laws, has accomplished real and significant change in a surprisingly short period of time. At the nominating convention Sunday night, those by-laws met their first stiff test — and passed with flying colors.

Throughout that meeting, Bob Kelly presided quietly, almost never without a smile.

Bob Kelly had — and has — good reason to be smiling.

So does every county resident interested in the upgrading of politics and government.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   I do not believe I have any potential conflicts of interest; however, if one should arise, I would correct it by resigning from a position that was in conflict or selling an asset that in any way conflicted with the future employment.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   The only outside employment that I would like to continue would be the part-time teaching position at Villanova University Law School.

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   From 1972 until May of 1975, I was Chairman of the Delaware County Republican Executive Committee. In that capacity, I presided over all party affairs including the election of candidates during that time. I resigned as Chairman of the Delaware County Republican Executive Committee in May of 1985 when I filed as a candidate for judicial office.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

   Not applicable since I have been a Judge for over eleven years.

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

   Financial net worth statement is attached.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		
Cash on hand and in banks	$7,800	00
U.S. Government securities—add schedule	None	
Listed securities—add schedule A	1,384	00
Unlisted securities—add schedule		
Accounts and notes receivable:		
Due from relatives and friends	None	
Due from others		
Doubtful		
Real estate owned—add schedule B	150,000	.00
Real estate mortgages receivable	None	
Autos and other personal property	22,000	.00
Cash value—life insurance	None	
Other assets—itemize:		
IRA Account	10,184	.00
House Contents	10,000	.00
Children's Trust Acct	11,800	.00
(Schedule E)		
Total assets	$213,168	.00

LIABILITIES		
Notes payable to banks—secured	None	
Notes payable to banks—unsecured	$2,398.	00
Notes payable to relatives	None	
Notes payable to others	None	
Accounts and bills due	None	
Unpaid income tax	None	
Other unpaid tax and interest	None	
Real estate mortgages payable—add schedule C	$37,447	52
Chattel mortgages and other liens payable	None	
Other debts—itemize:	None	
Wife's student loan	10,000	00
Children student		
loans (Schedule D)	30,150	00
Total liabilities	79,995	52
Net worth	$133,172	.48
Total liabilities and net worth		

CONTINGENT LIABILITIES		
As endorser, comaker or guarantor	None	
On leases or contracts	None	
Legal Claims	None	
Provision for Federal Income Tax	None	
Other special debt	None	

GENERAL INFORMATION		
Are any assets pledged? (Add schedule.)	No	
Are you defendant in any suits or legal actions?	No	
Have you ever taken bankruptcy?	No	

Schedule A

18 shs. Ralston Purina Common	$ 1,384.00

Schedule B

Real Estate located at 213 Hilldale Road Villanova, Pa.	value	$150,000.00

Schedule C

Real Estate Mortgage #512031235 Fidelity Bond & Mortgage Co.	$ 37,447.52

Schedule D

Children's Student Loans:

Robert F. Kelly, Jr.	$ 12,150.00
Elizabeth S. Kelly	7,500.00
Johanna D. Kelly	8,000.00
Owen J. Kelly	2,500.00
	$ 30,150.00

Schedule E

Children's Trust Account:

Acct. # 23-06-7440144		
T.I. # 23-67749880	balance	$ 11,800.00

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibliities.

I believe that in some cases the judicial branch has acted to fill a void created by the inability or unwillingness of the other branches of government to act. Although this has not necessarily led to bad results in every case, it is an extremely dangerous trend to have judges who are elected for a life term making decisions based upon their own personal views. The time may well come when such decisions lead to bad results that are unpopular with a majority of the public and there will be no effective way to have the will of the people expressed other than by the lengthy and difficult procedure of constitutional amendment.

The judiciary should not decide what result it thinks is right and then try to find a way to get that result. Rather, it should be ruled by what the constitution says, that is, the judges function should be to apply the constitution to the resolution of the grievance before it. When the meaning of the constitution is not clear and some interpretation must be placed upon it, it should be the Framers' interpretation that should be sought not the individual judges. The starting point should be the intent of those who wrote the law in the first place.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

When I started in private law practice, I served for one year on the voluntary defender staff of Delaware County. This was basically a non-paid position where the volunteer attorneys represented all of those held in prison awaiting trial who could not afford attorneys.

All during my years as an attorney in private practice, my name was on the list of attorneys who agreed to accept the assignment of cases on a reduced fee basis. This list was administered by the Delaware County Bar Association and the attorney, who agreed to take such cases, did so for a reduced fee or, in many cases, a nominal fee for clients who, although were not totally indigent, could not afford to pay standard attorneys' fees.

MAY -7 AM 11:02

AMERICAN BAR ASSOCIATION

Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101

Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA CIRCUIT & FEDERAL CIRCUIT
James J. Bierbower
International Square
Suite 1275
1875 Eye Street, N.W.
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May 1, 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: ROBERT F. KELLY
United States District Court
Eastern District of Pennsylvania

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Robert F. Kelly for appointment as Judge of the United States District Court for the Eastern District of Pennsylvania.

A majority of our Committee is of the opinion that Judge Kelly is "Well Qualified" for this appointment. The minority found him to be qualified.

Sincerely,

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

BIOGRAPHY

JAMES T. TURNER

Birth:	**March 12, 1938**	**Clifton Forge, Virginia**
Legal Residence:	**Virginia**	
Marital Status:	**Married**	**Patricia Renfrow Turner** **1 child**
Education:	**1956 - 1960**	**Wake Forest College** **B.A. degree**
	1962 - 1965	**University of Virginia** **School of Law** **LL.B. degree**
Bar:	**1965**	**Virginia**
Military Service:	**1960 - 1962**	**United States Army**
Experience:	**1965 - 1979**	**Williams, Worrell, Kelly & Greer, P.C.** **Associate (1965 - 1970)** **Partner (1971 - 1979)**
	1979 - present	**United States Magistrate** **Eastern District of Virginia**
Office:	**1973 United States Courthouse** **600 Granby Street** **Norfolk, Virginia 23510** **804 441-3544**	

To be a Judge of the United States Claims Court

QUESTIONNAIRE FOR JUDICIAL NOMINEES
PERTAINING TO JAMES T. TURNER
APRIL 24, 1987

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Name: James Thomas Turner. No other names ever used.

2. Address: List current place of residence and office address(es).

Current residence:

Office address: 173 United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

3. Date and place of birth.

March 12, 1938.
Clifton Forge, Virginia

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Spouse: Patricia Sue Renfrow Turner. Teacher. Married since July 8, 1962. Spouse's current employer (since May 1984) is the Norfolk Public School System, City Hall Avenue & St. Paul's Boulevard, Norfolk, Virginia.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Wake Forest College
Winston-Salem, N.C.
September 1956 - June 1960
Bachelor of Arts (English)
June 4, 1960

University of Virginia
Charlottesville, Virginia
September 1962 - June 1965
LLB (retroactive J.D.)
June 6, 1965

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

July 1, 1979 to date, United States District Court for the Eastern District of Virginia at Norfolk; United States Magistrate.

January 1, 1971 to June 30, 1979, Williams, Worrell, Kelly & Greer (law firm); Norfolk, Virginia; partner.

June 1965 to December 1970, Williams, Worrell, Kelly & Greer (law firm); Norfolk, Virginia; associate.

Fall 1963 to June 1965, Deets & Martin (law firm); Charlottesville, Va.; legal assistant (part-time & summer work).

Summer 1963, Ivy Construction; Charlottesville, Va.; general labor and clerical work.

September 1960 to September 1962, U.S. Army; Fort Benning, Fort Holabird & Fort Bragg; intelligence officer.

June 1960 to August 1960, Winston-Salem Journal (morning newspaper); Winston-Salem, North Carolina; desk reporter and copy desk employee.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Yes. September 10, 1960 through September 9, 1962. Army; second lieutenant, first lieutenant; serial number 05309857. Honorable discharge from reserve with rank of captain.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Omicron Delta Kappa (national leadership fraternity) at Wake Forest College.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

a) National Council of United States Magistrates (1979 to date). Offices: immediate past president (1985-86); president (1984-85); president-elect (1983-84); vice president (1982-83); secretary (1981-82); director from the Fourth Circuit (1980-81).

b) Federal Bar Association (1982 to date).

c) American Bar Association (1965 to date).

d) Virginia State Bar (1965 to date).

e) Virginia Bar Association (1965 to date).

f) Norfolk & Portsmouth Bar Association (1965 to date). Office: secretary (1977-79).

g) Tidewater Estate Planning Council (1973-79). Office: treasurer (1976-79).

h) Fourth Circuit Judicial Conference (1983 to date).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong.

a) Lobbying organizations are those listed as a, b and c in response to item 9 above.

b) Larchmont United Methodist Church, Norfolk, Virginia (1965 to date).

c) Harbor Club (a downtown restaurant club), Norfolk, Virginia (1971 to date).

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court, August 28, 1973

United States Court of Appeals for the Fourth Circuit, November 1, 1972

Supreme Court of Virginia, June 7, 1965

United States District Court for the Eastern District of Virginia, August 3, 1965

12. Published Writings: List the titles, publishers, and dates of books, articles, reports or other published material you have written.

There are no legal articles or books which I have written.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent.
February 13, 1987.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

United States Magistrate, July 1, 1979 to date, United States District Court for the Eastern District of Virginia; appointed by the district judges of said court for eight-year term. With consent of the parties and assignment by the court, jurisdiction since October 1979 has included any and all civil cases, whether jury or non-jury and regardless of the subject matter or amount in controversy, and any and all non-felony criminal cases. The sole limitation on jurisdiction, upon assignment by a district judge and with consent of the parties, has been conducting actual trial of felony cases. Even without consent of the parties, any nondispositive pre-trial motion, including those in felony cases, may be addressed by a magistrate and dispositive motions (e.g., a motion for summary judgment) can be assigned to a magistrate for report and recommendation concerning disposition.

No other judicial office previously held.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

a. I have been a federal magistrate since July 1, 1979. The only published opinion of mine appeared in American Maritime Cases (1982 AMC 99). A copy is included with opinions described in paragraph b below. For the entire time I have been a judicial officer, West Publishing Company has declined, as a matter of policy, to publish opinions of federal magistrates except in Federal Rules Decisions. This is the principal reason why no other opinions of mine have been published.

b. As an alternative to citation of published opinions and in response to the request for significant opinions on constitutional issues, I enclose copies of 14 opinions authored by me which deal with a broad range of issues and various kinds of cases. Citations to appellate review of such opinions are noted where applicable. The enclosed opinions are the following:

(1) Maritime Contract Case. Opinion and Order, Nordasilla v. Norfolk Shipbldg. & Drydock Corp. (E.D.Va. 1981), 1982 AMC 99, aff'd, No. 81-1978 (4th Cir., Apr. 16, 1982)(unpublished).

(2) Miller Act Case. Opinion and Order, United States for the use of Dive Scan, Inc. v. Rose Marine, etc., et al., Civil Action No. 85-34-NN (E.D.Va., June 12, 1986).

(3) Federal Tort Claims Act Case. Opinion and Order, Wainwright v. United States, Civil Action No. 83-30-NN (E.D.Va., Oct. 25, 1983).

(4) Section 1983 Cases.

(a) Magistrate's Report and Recommendation, Wilkins, et al. v. Hartman, et al., Civil Action Nos. 81-225-N, 81-224-N, 81-295-N, 81-296-N, 81-297-N (E.D.Va., July 21, 1983).

(b) Magistrate's Report and Recommendation, Jackson v. Irving, et al., Civil Action No. 83-744-N (E.D.Va., Oct. 17, 1984).

(c) Opinion and Order, Haythe v. Davis, Civil Action No. 85-303-N (E.D.Va., Sept. 20, 1985).

(d) Magistrate's Report and Recommendation, Fitzgerald and Coleman v. Landon, et al., Civil Action No. 84-265-N (E.D.Va., Jan. 13, 1986)(First Amendment issues).

(5) Habeas Corpus Cases (various issues).

(a) Magistrate's Report and Recommendation, Berlin v. Hutto, Civil Action No. 81-356-N (E.D.Va., May 16, 1984).

(b) Magistrate's Report and Recommendation, Berlin v. Murray, Civil Action No. 86-315-N (E.D.Va., Jan. 6, 1987).

(6) Habeas Corpus Death Cases.

(a) Magistrate's First Preliminary Report, Mason v. Procunier, Civil Action No. 83-157-N (E.D.Va., Apr. 20, 1984).

(b) Magistrate's Report and Recommendation, Mason v. Procunier, Civil Action No. 83-157-N (E.D.Va., May 8, 1984), aff'd 748 F.2d 852 (4th Cir. 1984).

(c) Magistrate's Report and Recommendation, Giarratano v. Procunier, Civil Action No. 83-185-N (E.D.Va., Oct. 4, 1984).

(d) Magistrate's Preliminary Report, Giarratano v. Procunier, Civil Action No. 83-185-N (E.D.Va., March 27, 1985).

(e) Magistrate's Third Report and Recommendation, Giarratano v. Procunier, Civil Action No. 83-185-N (E.D.Va., May 9, 1985).

c. Following are citations to appellate opinions concerning other matters handled by me:

(1) Eastern Auto Distribs., Inc. v. Peugeot Motors of America, Inc., 795 F.2d 329 (4th Cir. 1986).

(2) Gay v. American Motorists Ins. Co., 714 F.2d 13 (4th Cir. 1983).

d. Attached are copies of the following unpublished appellate opinions concerning other matters handled by me:

(1) In re Aetna Casualty and Sur. Co. and Lynnhaven Marine Constr., Inc. v. Norfolk Redev. & Hous. Auth., No. 85-1589 (4th Cir., Jan. 6, 1986)(unpublished).

(2) Wainwright v. United States, No. 83-2111 (4th Cir., Sept. 19, 1984)(unpublished).

(3) Nordasilla Corp. v. Norfolk Shipbldg. & Drydock Corp., No. 81-1978 (4th Cir., Apr. 16, 1982)(unpublished).

e. (1) As a federal magistrate I am empowered to make the final decision and direct entry of judgment only in cases where the parties have consented to my jurisdiction. Only one case in which I entered final judgment, either civil or criminal, has ever been reversed and none has been affirmed with significant criticism. (Please see paragraphs c. and d. above for list of appellate affirmances in civil cases.)

(2) The one case in which I was reversed by the Court of Appeals involved a dispute over the proceeds of a government life insurance policy. I had held that certain conduct of the insured/policy owner suggesting an intention to change the policy beneficiary was not effective to change the beneficiary. In so holding I distinguished a Fourth Circuit decision that on certain facts, the statutory requisites for change of beneficiary need not be complied with. The appeal of right was taken to a district judge who affirmed my judgment. On petition for further appeal, the Fourth Circuit Court of Appeals reversed, concluding that certain conduct and expressions of the insured/policy owner were sufficient to effect a change of beneficiary United States v. Wallace and Gilligan, No. 80-1684 (4th Cir., June 8, 1982)(unpublished).

(3) I have handled hundreds of habeas corpus matters and many cases under 42 U.S.C. § 1983 which were assigned to me without consent of the parties and with respect to which I rendered a report to a district judge with a recommendation for disposition. In only one (in which I recommended granting to a habeas petitioner a retrial on grounds of ineffective assistance of counsel) of these matters has the district judge involved declined to accept my recommendation.

(4) In a few of these habeas corpus cases (probably not more than five) my recommended disposition on which the court's final order was based was vacated on a procedural

point and remanded for further proceedings. In one, Wilson v. Murray, Civil Action No. 85-11-N (E.D.Va., May 13, 1985), rev'd, 806 F.2d 1232 (4th Cir. 1986), the Court of Appeals vacated and granted the habeas petitioner a retrial in the state courts based on an intervening U.S. Supreme Court decision.

(5) One other such adopted recommendation, which rested on a construction of the habeas doctrine of procedural default expounded in Wainwright v. Sykes, 433 U.S. 72 (1977), was initially vacated and remanded by the Fourth Circuit, Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), aff'd, 754 F.2d 520 (4th Cir. 1985)(en banc), but was reinstated by the United States Supreme Court, Murray v. Carrier, 106 S.Ct. 2639 (1986).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge,

I have never served as clerk to a judge.

2. whether you practiced alone,

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

June 1965 through June 1979,
(Williams, Worrell, Kelly & Greer, P.C.
600 United Virginia Bank Building
Norfolk, Virginia 23514

(formerly law partnership under same name and the names Williams, Cocke, Worrell & Kelly and Williams, Worrell, Kelly & Worthington)

Associate June 1965 through December 1970
Partner January 1971 through June 1979

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

General civil practice. For first three years (1965-68) emphasis was on insurance defense litigation. Thereafter, focus shifted to business practice, including business litigation, estates and trusts and EEOC litigation. During the last five years (1974-79) practice included major emphasis on employment benefits law.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients ranged from railroads, insurance companies and banks to small and medium-sized local businesses to individual wills, trusts and real estate clients.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Varied from regularly to occasionally. First six years of practice (1965-70) involved frequent appearances in courts not of record for trials and in state and federal courts of record for motions, pretrial conferences, docket calls and trials. During last eight years of practice (1971-79) primary focus of practice shifted to business law, revenue bonds and other less frequently litigated subject areas and to employment discrimination cases which, though frequently complex and prolonged, required less frequent court appearances.

2. What percentage of these appearances was in:

(a) federal courts - 50%

(b) state courts of record - 25%

(c) other courts. - 25%

3. What percentage of your litigation was:

(a) civil - 100%

(b) criminal - Zero, virtually. In 14 years of law practice, I made no more than 10 appearances in traffic court, all on behalf of family, friends and civil clients, and handled no more than six other criminal matters, all assigned and all in courts not of record.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Approximately 16, six as associate counsel and 10 as sole counsel.

5. What percentage of these trials was:

(a) jury - 50%

(b) non-jury - 50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I have not practiced law since July 1, 1979 when I became a full-time federal magistrate.

There are only six litigated matters which I deem worthy of mention in response to question 18, four of which reached the appellate stage (one on two occasions) and all of which were

handled in the last nine years of my law practice. These six matters are as follows:

(1) Robert Rock, et al. v. Norfolk and Western Railway Company and United Transportation Union; Civil Action No. 255-69-N.

Name of court and judge: United States District Court for the Eastern District of Virginia (Norfolk Division); Judge John A. MacKenzie.

Appellate citations: 532 F.2d 336 (4th Cir. 1975), cert. denied, 425 U.S. 934, 96 S.Ct. 1664 (1976); 473 F.2d 1344 (4th Cir. 1973).

Capsule summary and significance: A class action brought by a predominantly black local union of railway brakemen and several of its black members against the railway company and their national union seeking merger of brakemen's and conductors' seniority rosters for a predominantly white and a predominantly black rail yard in Norfolk, Virginia. When commenced in June 1969, case was one of the early EEOC class actions against a major railway and was significant in determining that a court's ruling in an EEOC case could lawfully abrogate a railway labor agreement.

I represented the Norfolk and Western Railway Company. The case was filed in June 1969 and was terminated in June 1979. I was associate counsel from commencement of the action until death of the senior counsel in February 1973 and was sole counsel for the railway company from February 1973 to June 1979 during which period there was one trial on remand and numerous other hearings on motions of various kinds. The case was twice appealed to the Fourth Circuit Court of Appeals and on both occasions I was sole counsel for the railway company.

Plaintiffs ultimately prevailed on litigated liability issues and on issue of entitlement to back pay. Amount of back pay and attorneys' fees to be awarded was settled.

Case was initially tried April 13-16, 1971, October 25, 1971 and April 20, 1972 and was retried on remand October 4, 1973. Numerous other hearings on motions and on a second remand were conducted. Appeals were argued November 1, 1972 and February 4, 1975.

Counsel:

Initial co-counsel (until February 1973): William C. Worthington, now deceased.

Counsel for plaintiffs:

Morris J. Baller
Marron, Reid & Sheehy
601 California Street, Suite 1200
San Francisco, California 94108
(415 434-0800)

Robert Belton
Visiting Professor
Harvard Law School
Cambridge, Massachusetts 02138
(617 499-3124)

In later years, counsel for plaintiff:

William T. Mason, Jr.
Suite 1612, First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, Virginia 23510-2785
(804 622-0224)

and

Gwendolyn J. Jackson
555 Fenchurch Street
Suite 305
Norfolk, Virginia 23510
(804 622-9031)

Counsel for co-defendant United Transportation Union and a union local:

Willard J. Moody
Suite 201, J.J. Henry Building
County at Court Street
Post Office Box 1138
Portsmouth, Virginia 23705-1138
(804 393-4094)

Walton G. Bondurant, Jr.
706 London Blvd. at Green Street
Portsmouth, Virginia 23607
(804 397-4677)

(2) David Williams and Junius B. Russell v. Norfolk and Western Railway Company; Civil Action No. 60-73-N (E.D. Va., Apr. 16, 1979).

Court and judge: U.S. District Court for the Eastern District of Virginia (Norfolk Division); Judge John A. MacKenzie.

Appellate citation: 530 F.2d 539 (4th Cir. 1975).

Capsule summary and significance: EEOC suit by two black railway brakemen, who had been employees of an acquired railway, against acquiring railway company and local union alleging discrimination in the manner in which their names were merged into the seniority roster of acquiring railway. Appellate decision significant in holding that a release for consideration executed by employees of acquired railway company did not bar later EEOC action alleging that previously settled matters were result of or constituted racial discrimination when white employees of acquired railway received more favorable seniority treatment.

I represented the Norfolk and Western Railway Company and was sole counsel for trial and appeal. Final disposition: railway company prevailed at trial; plaintiffs prevailed on appeal.

Trial was conducted September 13, 1973. Appeal was argued December 6, 1974.

Plaintiffs' counsel:

Howard I. Legum
Fine, Fine, Legum & Fine
One Commerce Park
Witchduck Road at Cleveland Street
Post Office Box 61546
Virginia Beach, Virginia 23462
(804 490-4545)

Counsel for union defendant:

Walton G. Bondurant, Jr.
706 London Blvd. at Green Street
Portsmouth, Virginia 23607
(804 397-4677)

(3) William T. Kelley, et al. v. Norfolk and Western Railway Company, Civil Action No. 75-66-N, E.D.Va.

Court and judge: U.S. District Court for the Eastern District of Virginia; Judge John A. MacKenzie.

Appellate citation: 584 F.2d 34 (4th Cir. 1978).

Capsule summary and significance: EEOC suit by eight black shopcraft employees at railway car repair facility in Norfolk, Virginia (attempted class action) alleging discriminatory denial of promotion. Case contributed to jurisprudence that 70 potential class members did not necessarily meet numerosity test for class certification where other factors militated in favor of individual claims.

I represented the Norfolk and Western Railway Company as sole counsel from the inception of the litigation which included trial and appeal. The railway company prevailed at trial and on appeal.

Trial was conducted September 29, 1975; appeal was argued March 9, 1978.

Plaintiffs' counsel:

Alan P. Owens
Suite 223, Monticello Arcade
211 East City Hall Avenue
Post Office Box 3727
Norfolk, Virginia 23514
(804 623-3523)

(4) Greenco Corp. v. City of Virginia Beach.

Court and judge: Circuit Court of the City of Virginia Beach, Virginia; Judge Robert S. Wahab, Jr.

Appellate citation: 214 Va. 201, 198 S.E.2d 496 (1973).

Capsule summary and significance: Suit by landowner adjoining public way dedicated by recordation of plat to obtain declaratory judgment that, under Virginia law, the city never accepted the offer of dedication and that consequently adjoining owner was entitled to use platted street for private business purposes. Case contributed to resolution of Virginia law to the effect that if a municipality accepts any portion of a dedicated right-of-way, it is deemed to have accepted the entire area dedicated by plat.

I represented plaintiff Greenco Corporation, owner of an amusement park and motel adjoining platted public right-of-way. I was associate counsel through the trial stage and co-counsel on appeal. Defendant city prevailed at trial and on appeal.

Trial dates: Precise dates unknown but covered various days in 1972. Appeal was argued in 1973, decided August 30, 1973.

Senior counsel at trial was William C. Worthington, a law partner, now deceased. Co-counsel on appeal was:

Lawson Worrell, Jr.
3417 South Park Circle
Roanoke, Virginia 24018
(703 989-8130)

Counsel for defendant City of Virginia Beach at trial:

J. Dale Bimson
City Attorney
City Attorney's Office
Municipal Center
Virginia Beach, Virginia 23456
(804 427-4531)

Counsel for defendant City of Virginia Beach on appeal:

Joseph J. Lawler
Kellam, Pickrell & Lawler
Suite 1020
First American Bank Building
Norfolk, Virginia 23510-1781
(804 627-8365)

(5) Philip J. Terveer v. Lincoln National Life Insurance Company, Lincoln National Sales Corporation and Lincoln/Dixon/Stall, Inc. Civil Action No. 77-247-N, E.D.Va.

Court and judge: U.S. District Court for the Eastern District of Virginia (Norfolk Division); Judge Richard B. Kellam, Jr.

Capsule summary and significance: An age discrimination in employment case brought by discharged 44-year-old insurance agent and executive. Case was routine age discrimination case resolved by jury verdict and not appealed.

I was sole counsel for the defendants from the inception of the matter through trial. Defendants obtained favorable verdict and judgment.

Trial date: November 3, 1977.

Plaintiff's counsel:

Anthony L. Montagna, Jr.
804 One Main Plaza East
Norfolk, Virginia 23510
(804 625-3500)

(6) Ernest L. Bennett v. J.C. Penney Company, Inc., Civil Action 77-757-N, E.D.Va.

Court and judge: U.S. District Court for the Eastern District of Virginia (Norfolk Division); Judge J. Calvitt Clarke, Jr.

Capsule summary and significance: An EEOC suit by mechanic at auto repair facility alleging racially discriminatory job assignments and promotions. In most respects case was routine EEOC case which was not appealed and consequently was of no particular significance in development of law. Locally, helped establish usefulness of statistics gleaned from well-kept records in defending against allegations of discriminatory job assignments.

I represented the defendant J.C. Penney Company, Inc. and was sole counsel from inception through final judgment; defendant prevailed.

Trial was conducted October 17, 1978.

Plaintiff's counsel:

James F. Gay
1317 East Brambleton Avenue
Norfolk, Virginia 23504
(804 627-3100)

Gwendolyn J. Jackson
555 Fenchurch Street
Suite 305
Norfolk, Virginia 23510
(804 622-9031)

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter.

In addition to cases listed in response to question 18 above, the following are deemed to have been especially significant legal activities.

Over a period from June 1970 to August 1977, I participated as co-counsel (the one most involved in day-to-day representation) for the equity receiver of 27 small loan finance companies which had been placed in equity receivership pursuant to an action brought by the Securities and Exchange Commission for securities law violations. Securities & Exchange Commission v. F. Wallace Bowler, et al., Civil Action No. 516-69-N (E.D.Va.).

The representation involved all phases of legal work required by both an equity receiver and the operator of numerous small loan companies, including preparation and presentation of 47 applications related to the administration and eventual liquidation of various individual assets ranging from real and tangible personal property to blocks of small loan paper. The ultimate liquidation of all the companies resulted in some return to investors who had been financially damaged by securities violations.

Over the period from approximately 1970 to 1979 I was involved in the issuance of a number of industrial revenue bonds. In one transaction or another I represented lenders, borrowers and the issuing authority. In the two most significant of these bond transactions, I represented the Norfolk Industrial Development Authority in the issuance of two bonds, one for approximately $22,000,000 and one for approximately $4,000,000, both for the construction of a hospital complex.

QUESTIONNAIRE FOR JUDICIAL NOMINEES
PERTAINING TO JAMES T. TURNER
APRIL 24, 1987

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

The only financial arrangement which might possibly be included in such categories is my account in a Keogh retirement plan established by my former law firm, Williams, Worrell, Kelly & Greer in Norfolk, Virginia. No contributions are or ever were made to my account in the plan except from my share of partnership income over the period from January 1, 1975 through June 30, 1979. Plan assets are held in a trust administered by American Bar Retirement Association and are beyond the control of the former partnership. Trust assets are invested with and managed by The Equitable Life Assurance Society of the United States.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would resolve any potential conflict of interest by recusing myself from any case which presented any such potential. Further, I am cognizant of and would abide by the letter and spirit of 28 U.S.C. § 455 and the Code of Judicial Conduct for United States Judges. The name of the plaintiff in any U.S. Claims Court matter assigned to me would immediately alert me to any potential conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court?

No.

4. Have you ever held a major position or played a major role in a political campaign?

No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

Not applicable. My association with prior law firm was terminated as of June 30, 1979; all amounts due from my former firm by reason of my capital account and my work on then-pending matters was fully paid not later than June 30, 1984.

6. Please complete the attached financial net worth statement in detail.

See attached financial statement with schedules.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

JAMES T. & PATRICIA R. TURNER DATE: APRIL 24, 1987

ASSETS		LIABILITIES	
Cash on hand and in banks	26,045	Notes payable to banks—secured *	–
U.S. Government securities—add schedule	–	Notes payable to banks—unsecured	–
		Notes payable to relatives	–
Listed securities—see schedule 1	938	Notes payable to others (GMAC)	9,448
Unlisted securities–see schedule 1	52,604	Accounts and bills due	1,263
Accounts and notes receivable:		Unpaid income tax	–
Due from relatives and friends	–	Other unpaid tax and interest	–
Due from others	–	Real estate mortgage payable**	26,364
Doubtful	–		
Real estate owned–see schedule 1	170,000	Chattel mortgages and other liens payable (see GMAC above)	–
Real estate mortgages receivable	–		
Autos and other personal property	43,500	Other debts—itemize: Line of Credit (United	
Cash value—life insurance	–	Virginia Bank)	7,565
Other assets—itemize: See schedule 2	161,839		
		Total liabilities	44,640
		Net worth	410,286
Total assets	454,926	Total liabilities and net worth	454,926

CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	None	Are any assets pledged? (Add schedule.)	No
On leases or contracts	***		
Legal Claims	None	Are you defendant in any suits or legal actions?	No
Provision for Federal & Va. Income Tax (est.)	3,750	Have you ever taken bankruptcy?	No
Other special debt	None		

*None other than that secured by home mortgage listed below.

**Mortgage on home payable to Peoples Bank of Chesapeake, Chesapeake, Virginia.

***Contract for purchase of residence in Falls Church, Virginia for $278,000. Purchase price will be paid by application of (1) equity in current residence, (2) portion of liquid assets reflected on this statement and (3) proceeds of purchase money mortgage in approximate amount of $100,000.

Schedule 1

FINANCIAL STATEMENT
Pertaining to
JAMES T. AND PATRICIA R. TURNER

Listed Securities

Shares	Company	Value
25	Marriott Corporation	$ 938

Unlisted Securities

Shares	Company	Value
52,604	USAA Mutual Fund, Inc. (Money Market Fund)	$ 52,604

Real Estate Owned

Description	Value
1. Residence and adjoining marsh lot at 5440 Glenhaven Crescent, Norfolk, Virginia	$ 140,000
2. One-half interest in 121-acre farm in Bladen County, North Carolina	30,000

Schedule 2

FINANCIAL STATEMENT
Pertaining to
JAMES T. AND PATRICIA R. TURNER

Other Assets

Description	Value
1. Individual Retirement Accounts with United Virginia Bank, Norfolk, Virginia	$ 4,211
2. Individual Retirement Accounts with USAA Mutual Fund, Inc. (Money Market Fund) San Antonio, Texas	13,679
3. Individual Retirement Accounts with Smith Barney Funds, Inc. (Income and Growth) New York, New York	4,513
4. Keogh Plan Account with American Bar Association Members' Retirement Program administered by The Equitable Life Assurance Society of The United States	104,261
5. Deposits with Federal Civil Service Retirement System	30,175
6. Deposit with Falls Church home purchase contract (to be applied to purchase price)	5,000

QUESTIONNAIRE FOR JUDICIAL NOMINEES
PERTAINING TO JAMES T. TURNER
APRIL 24, 1987

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

"Judicial activism" is a phrase which has come to signify that the judiciary has improperly reached beyond its traditional role of arbiter of disputes in order to resolve and impose its perception of the best solution for broad social problems.

My general impression from news reports is that there may well have been instances in which individual judges have been all too anxious to reach beyond the issues in a given case in order to "correct" some perceived broader problem. Where this criticism is justified, I believe that the fall-out from such judicial over-reaching is a regrettable disenchantment with the judiciary and justifiable resentment by the public and the legislative and executive branches of government.

On the other hand, I also have the general impression that much of the criticism set forth in the question may result from a misunderstanding of the breadth of cases brought to the federal courts, a failure to appreciate the virtual explosion within the past 25 years of legislation creating various wide-ranging new rights (e.g., environmental legislation, Occupational Safety and Health Act, Education of the Handicapped Act), and a misunderstanding of the forms of litigation provided by Congressionally sanctioned rules such as those authorizing class actions and joinder of parties. When the parties (including a class) properly present broad issues, some of which may be characterized as social issues, for resolution by a federal court, the court has no choice but to squarely address the matter and resolve it in accordance with legal principles.

Further, there may be a misunderstanding among segments of the public of the operation of the doctrine of res judicata. To state the obvious, the decision of a court in a particular case can directly bind only the parties before it. It is the operation of the ancient doctrine of res judicata, rather than the desire of a judge to "legislate," which most frequently affects persons not parties to the litigation.

In any event, my strong impression is that none of the criticisms listed in the question has ever applied to the United States Claims Court or any of its judges. The nature of Claims Court jurisdiction and litigation is such that it is highly unlikely that anyone could ever justly accuse its judges of any of the five listed tendencies or of any usurpation of prerogatives of the legislative or executive branch.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

I have not practiced law since becoming a United States Magistrate on July 1, 1979. During my law practice from June 1965 through June 1979, I represented several indigent juveniles charged with felonies upon assignment by the Norfolk Juvenile and Domestic Relations Court. In the late 1960's and early 1970's, I was a volunteer counselor on legal matters at the Norfolk Free Clinic, a clinic established to provide free medical and legal assistance on a confidential basis to predominantly young drug users and homeless young people. Further, I provided routine legal services from time to time at no fee or a reduced fee for disadvantaged persons referred by other clients. For a number of years I participated in annual Law Day programs at high schools, the ultimate purpose of which was to encourage belief in and support of the rule of law and equal justice under law.

CONFIRMATION HEARING ON: DAVID G. LARIMER AND LARRY J. McKINNEY

THURSDAY, JUNE 18, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room SD-226, Dirksen Senate Office Building, the Hon. Howell Heflin, presiding.

Also present: Senators Humphrey and Thurmond.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator **HEFLIN**. The committee hearing on judicial nominations will come to order.

We have a vote on and some of the Senators who want to introduce the nominees are not here, but in order to expedite matters, Mr. Larimer, if you will come forward. Please raise your right hand and take the oath.

Do you swear that the testimony you give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God.

Judge **LARIMER**. I do.

Senator **HEFLIN**. Mr. Larimer, if you will be seated, I would like to ask you at this time to introduce the members of your family who might be here.

TESTIMONY OF HON. DAVID G. LARIMER, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF NEW YORK

Judge **LARIMER**. Mr. Chairman, I am happy to introduce my wife, Karen, seated here on my right. My children, I regret that they cannot be here. This is their final week of exams. My three children are, I hope, studying.

I would also like to introduce a former colleague of mine in the U.S. Attorneys Office, now a Judge on the District of Columbia Court of Appeals, the Hon. John Terry, who also is here this afternoon.

Senator **HEFLIN**. Judge Terry, we are delighted to have you here.

You have been nominated for the U.S. District Court for the Western District of New York. There may be a couple of matters the staff would like to check with you later. I do not have any questions. You have been marked qualified by the American Bar Association unanimously. In order to allow the Senators from your State to be here and to introduce you, we will temporarily adjourn.

We will come back and let them say their good words about you. They tell me they have good words they want to put on you.

Judge **Larimer**. All right.

Senator **Heflin**. So we will let them put it on you in a little while, so with that you can step down and we will come back, and be relaxed. We do not shoot anybody here. We try to make you go away happy, and we hope that you will always preside happily when the people come before you.

Judge **Larimer**. I hope to. Thank you very much.

Senator **Heflin**. Thank you, sir.

[The following was subsequently supplied for the record:]

Nominee: David G. Larimer
Position: District Court Judge, Western District of New York

Response To Written Questions Submitted by Senator Patrick Leahy
By Letter Dated June 26, 1987

1. You resigned your position as Chief Appellate Law Assistant for the Appellate Division in July 1981. The next entry on your resume is dated January 1982, when you became the personal law assistant to one of the judges of that court. What did you do between July 1981 and January 1982?

> I resigned my position as Chief Appellate Law Assistant in July 1981 in order to run for Monroe County District Attorney in the November 1981 election. The court requested my resignation once I became an official candidate.
>
> During the summer and fall of 1981, I spent virtually all of my time working on my campaign. After the election in November, it took me a month or so to get situated with Justice John Doerr as his personal law assistant until I could obtain a more permanent association with a law firm.

2. You have been a very active member of the local bar in Monroe County, New York. You have held several important positions with the bar association there. And, of course, you are familiar with the local legal scene from your years as a litigator, an appellate court staff member, and a magistrate.

How do you think that this familiarity with the concerns and customs of the local bar will help you to be an effective federal judge?

> Throughout my legal career in Rochester, I have been involved in the Monroe County Bar Association. I have just completed a two-year term as a member of the Board of Trustees. I have also been actively involved in the Judiciary Committee and the Court's Committee. These activities have helped me in my role as magistrate and I am sure those associations will help me to be an effective federal judge.
>
> First of all, I have learned through my Bar Association activities what the Bar expects from its better judges. The Court's Committee's activities included suggesting improvements and correcting problems in the court system. The Judiciary Committee screens and rates all potential judicial candidates. In connection with both committees, I participated in a review and critique of dozens of state court judges. Throughout that process, I hope that I have learned much about what makes a good judge and what makes a not-so-good one.
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> As a trustee and in my committee work, I constantly attempted to improve attorney-judge relations. I also worked with judges in the Bench-Bar Committee to effect changes in the administration of the courts.
>
> In addition, I believe that my bar association activities have brought me in contact with a large segment of the bar. I have come to know many attorneys and they have come to know me. This knowledge of the bar and exposure to it will help me in dealing with attorneys and will, I hope, instill confidence in the bar in my work as a federal judge.

My activities as a litigator (both prosecutor and defense counsel), law clerk, appellate court counsel and federal magistrate give me a special perspective. I have seen the system from all "sides." I believe that this experience has instilled in me a certain balance and perspective that is necessary. I know the concerns of all those in the system. From being a participant in many different parts of the court system, I believe that I have learned much. I believe that all of this experience has been excellent preparation for the federal bench.

3. Part of a judge's role is administrative. What experience do you have in managing the operations of a court?

For the past four years I have been a United States Magistrate. I have assumed a full range of duties. These include: (1) trying civil cases by consent of the parties, (2) supervising discovery in many cases, (3) entering Scheduling Orders and managing discovery and pretrial stages of civil litigation, (4) hearing all criminal motions in Rochester, (5) supervising all pretrial activities in most criminal cases in Rochester, (6) trying misdemeanor and petty offense criminal cases.

I have been required to manage all of the cases assigned to me for trial or for pretrial activities. I also have conducted extensive settlement conferences and pretrial conferences. As magistrate I have worked closely with the district court in the management of its cases. My experience as a magistrate, which involves working daily in the federal court system, has been an excellent preparation for the case-management requirements of the district court.

As the Chief Law Assistant, for the Appellate Division, Fourth Department, from 1979 to 1981, I had managerial responsibility for the law assistant legal staff of the court. I was responsible for managing and supervising a ten-person staff of attorneys. I was responsible for reviewing all of the cases before the court and determining which ones would be reviewed and analyzed by the legal staff. I was responsible for assigning the work to the staff attorneys and I was directly responsible for supervising their work. That court is a high volume court and I was responsible to make sure that the appropriate cases were reviewed by the legal staff and that the staff's work on each case was completed in a timely fashion.

4. A judge must be prepared to try cases, but he or she must also be prepared to help the parties settle them. In your view, what is the proper role of a judge in facilitating the settlement of lawsuits?

I believe that a judge should take an active role in encouraging the parties to seek a settlement. I am convinced that most attorneys and clients welcome the active participation of the judge in settlement. It is often much easier for the judge to broach the topic of settlement than it is for one of the litigants. The judge's role should be to encourage settlement and to explore with counsel all possible means to reach a resolution. The judge should encourage discussion, advise the attorneys and the parties of the costs and time involved in a trial, and help the parties find some common ground acceptable to both sides. However, if the parties are unable to agree, the judge should not badger the parties or coerce settlements.

Special care must be taken concerning substantive discussions in non-jury cases. In those cases, it is best if another judge or magistrate conducts settlement conferences.

June 30, 1987
DATE

David G. Larimer
DAVID G. LARIMER

Senator **Heflin**. Is Mr. McKinney here? Well, we do not want him to be late for court.

Mr. **Bolton**. Mr. Chairman, we are told he is walking over with Lugar, Senator Lugar, who is also on his way.

Senator **Heflin**. We will wait a few minutes.

[Pause.]

Senator **Heflin**. All right, if you will come to the witness chair, your Senators or Senator want to introduce you but they are tardy. If you will raise your right hand, we will give you the oath.

Do you swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **McKinney**. I do, sir.

Senator **Heflin**. All right. If you will have a seat. As the first thing you do after being sworn in, would you kindly introduce your family?

TESTIMONY OF HON. LARRY J. McKINNEY, A NOMINEE TO BE U.S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA

Judge **McKinney**. I would be more than happy to, Mr. Chairman.

Mr. Chairman, I have brought with me my wife, Carol, my son, Josh, and my son, Andrew, and my father, Lawrence McKinney.

Senator **Heflin**. We are delighted to have you with us. You have a fine looking family, and I know that you are proud of them.

Senator Lugar and Senator Quayle will be here very shortly. Judge McKinney, we understand that you had a small-town law practice for eight years, served as the Deputy Attorney General in Indianapolis, had a good reputation as a State court judge, and were rated as well qualified by the ABA. Things sound good for you and as far as I know, there is nobody here to contest your nomination.

We do not do it like you do when you get married, when they say is there anyone within the sound of my voice who knows just cause why you ought not be confirmed, let them speak or forever hold their peace. We do not usually use that language. We know in advance who is going to be here to oppose judicial nominees, because our investigation on both sides of the aisle is very thorough, just as the American Bar Association's is very thorough.

The bell is ringing, so we will have a temporary recess, and I will try to round up the Senators so that they can put in a good word for you. Then we will come back.

Judge **McKinney**. Thank you, Mr. Chairman.

Senator **Heflin**. We will be in recess.

[Short recess.]

Senator **Heflin**. We will come back to order.

Senator Humphrey, I believe you wanted to say something.

Senator **Humphrey**. Thank you, Mr. Chairman. Yes, I would like to make a very brief statement and then I have to depart.

Mr. Chairman, I am glad to see these two fine nominees scheduled for hearing so promptly by the Committee, and I welcome them and their families. My preliminary review of the records of

Judge McKinney and Mr. Larimer give me every indication of confidence in their confirmation is well founded.

I would add, however, Mr. Chairman, that there are a number of other nominees to important vacancies who have been forced to wait excessive lengths of time for hearings. I am particularly concerned, for example, about the delay in considering Professor Bernard Siegan's nomination to the Ninth Circuit Court of Appeals. His nomination has now been before this Committee for nearly five months. I think the time has come for us to move on with Professor Siegan's nomination and to accelerate our procedures in the handling of judicial nominations in general. This is not the occasion for prolonged commentary, so I will defer more detailed remarks until the next Committee meeting.

I would simply stress that the case backlog in our Federal court system is too severe for us to proceed at what has so far been a leisurely pace in processing important nominations.

Senator HEFLIN. Senator Humphrey, you might be interested in knowing that as of this date in 1985, the 1st Session of the 99th Congress, hearings had been held on only 18 judges. Since we have held hearings in this committee now on 24, we are 6 judges ahead of last Congress' pace. We have held hearings on 33 percent more judges than Senator Thurmond, who was the Chairman then, at this point, and I believe if we are going to get into this we might talk about Judge Sporkin that was held up for 16 months. So I do not think we ought to get necessarily that partisan. Let us deal with the facts on this.

Anyway, we will be delighted to hear from you at a later date with more information.

Senator HUMPHREY. In greater detail.

Senator HEFLIN. All right.

We are delighted to have Senator Lugar here and we will be glad to hear from you, Senator Lugar.

STATEMENT OF HON. RICHARD G. LUGAR, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator LUGAR. Thank you very much, Mr. Chairman.

It is my honor and privilege to introduce to this distinguished Committee, Judge Larry McKinney, nominated to be United States District Judge for the Southern District of Indiana. Accompanying Judge McKinney today are his wife, Carol, and their sons, Joshua and Andrew, and his father, who are here in the hearing with us.

Judge McKinney's credentials are impressive. He earned a bachelor's degree from MacMurray College in 1966 and went on to Indiana University School of Law, graduating with a juris doctorate in 1969.

Upon graduation from law school, Judge McKinney served as a law clerk to the Indiana Attorney General. The next year, having passed the Indiana bar, he was sworn in as Deputy Attorney General. Judge McKinney has also had experience as a private practitioner, serving as a partner in two different two-man firms in Indiana between 1971 and 1978. In private practice, he dealt with typical small town problems, including personal injury, domestic relations, real estate collection and bankruptcy and also he specialized in hospital law and zoning. During these years, he appeared in court frequently.

In 1979, Judge McKinney was elected to the position of Johnson County Circuit Court Judge, the county just south of Marion County and Indianapolis, where he has presided over that court in Franklin, Indiana. He presides there today, having been reelected in 1984 for another six-year term.

Judge McKinney has established an outstanding record on the bench. His court has disposed of roughly 11,000 criminal and civil cases in the last 8 years. During this time, Judge McKinney has presided over 135 jury trials, including murder cases, and complex product liability decisions.

Mr. Chairman, Judge McKinney's professional accomplishments speak for themselves. He is an active member of the Indiana Council of Juvenile and Family Court Judges. He has also served on the Judicial Reform Committee of the Indiana Judicial Association since 1984.

It is important to note that his community looks upon his nomination very favorably. A recent editorial in the Franklin Daily Journal stated, "By all measurements, he is an excellent judge, one respected by the attorneys who try cases in his court, other judges throughout Indiana and the community he serves. His shoes will be hard to fill here."

I believe that Judge McKinney possesses the knowledge, reason and commitment to his work which make him an outstanding choice for the position of United States District Court Judge. I am pleased that the President has accepted the recommendation of the Indiana Merit Selection Committee on Federal Judicial Appointments, which Senator Dan Quayle and I established to review candidates for Federal judgeship positions.

I am honored to introduce Judge McKinney to the Committee and I urge your support for his confirmation.

I thank you, Mr. Chairman.

Senator HEFLIN. Thank you, Senator.

Senator Quayle, we will be delighted to hear from you now.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you very much, Mr. Chairman. I would ask at the outset that my entire statement be part of the record.

Senator HEFLIN. Without objection, so ordered.

Senator QUAYLE. Mr. Chairman, it is a special honor to join with my senior colleague in recommending Larry McKinney to be the District Court Judge.

Larry McKinney and I had the distinction of starting our careers in the basement of the Attorney General's office under former Indiana Attorney General Theodore Sendak, and both of us learned our skills, his judicial and mine political, on running the Multilith in that very important office in the State House of Indiana.

So, Judge McKinney comes to you today, Mr. Chairman, with tremendous qualifications. He is joined by his wife, Carol, who is an instructor in education, and in sociology at Franklin College, and his two sons, Joshua and Andrew.

I might just add to what Senator Lugar said about our Eerit Commission, that this is the sixth nomifee that the Merit Commission has submitted to the United States Senate for approval. Each one of the nominees have been acted upon with unanimous approval, and I think that you will find that this nominee is exceptionally well qualified. He has the legal skills and perhaps most importantly, not only does he demonstrate the legal skills, but I am duly impressed about what his peers and those that have practiced before him say: Let me just quote an editorial in the Indianapolis Star, on May 5:

> Attorneys who have pleaded their clients in McKinney's court endorse him for the Federal bench because they have been impressed by his scholarship and speed in making decisions in a court where many prominent lawsuits have been filed.

I think that you have that kind of testimony as to capability, to the character and the type of judge that Larry McKinney has been and the type of judge that he will be.

So, Mr. Chairman, it is with a great deal of honor and friendship that I am allowed to join with Senator Lugar in submitting to this committee one who will be an outstanding nominee, one that the President and the Senators from his State are very proud of, and somebody that will serve the State and this Nation very well as he assumes the duties of being the next United States District Court Judge in the Southern District of Indiana.

He has got tremendous qualifications in both intelligence and intellect; his character as a family man and his judicial temperament will go a long way in serving the interests I know that the Chairman and Senator Thurmond like to see in those that come before this Committee.

So with that, Mr. Chairman, I once again enthusiastically urge the favorable consideration of Larry McKinney, and I think that you will find him to be what we have both said and will hopefully be able to approve him because he will be a tremendous asset to that Southern District.

Thank you very much.

[The statement of Senator Quayle follows:]

Prepared Statement of U.S. Senator Dan Quayle

Mr. Chairman, I appreciate this opportunity to address you and the members of this Committee in support of the President's nomination of Johnson County Circuit Court Judge Larry J. McKinney to be a U.S. District Court Judge for the Southern District of Indiana.

In nominating Judge McKinney on May 5, President Reagan accepted the recommendation of the Merit Commission on Federal Judicial Appointments, the non-partisan merit selection panel that Senator Lugar and I established in 1981 to screen candidates and propose finalists for all federal judicial appointments in Indiana.

To date, five vacancies on the federal bench in Indiana have been filled by candidates who have been selected through this process, nominated by the President, approved by this Committee and unanimously confirmed by the U.S. Senate. One of those federal district court judges, Michael S. Kanne, served with such distinction that he was nominated and unanimously confirmed to be a U.S. Circuit Court Judge for the Seventh Circuit Court of Appeals earlier this year.

Larry McKinney has been nominated to fill the vacancy on the U.S. District Court for the Southern District of Indiana that was created when Judge William E. Steckler took senior status effective January 1, 1987. Given Judge McKinney's experience, skill and integrity, I am confident that he deserves to become the sixth person recommended by the Merit Commission to win both the endorsement of this Committee and confirmation by the full Senate.

A native of South Bend, Indiana, Judge McKinney received his Bachelor of Science degree in political science in 1966 from MacMurray College in Jacksonville, Illinois. In 1969, he received his J.D. degree from the Indiana University School of Law. Admitted to the Indiana Bar in 1970, he served as Deputy Attorney General of the State of Indiana from May of that year through September 1971. He was in private practice in Edinburgh and Greenwood until 1978, when he was elected to a six-year term as Judge for the Johnson County Circuit Court. In 1984, Judge McKinney was elected to a second term on the Johnson County Circuit Court, which is a constitutional court of general jurisdiction without limitation.

Judge McKinney, his wife Carole, who is an instructor of education, psychology and sociology at Franklin College, and their two sons—Joshua and Andrew—reside in Edinburgh, where Judge McKinney is a member and elder of the Presbyterian Church.

I believe that Larry McKinney's nine-year tenure on the Johnson County Circuit Court has prepared him well for the U.S. District Court for the Southern District of Indiana. The Johnson County Circuit Court has traditionally been a busy one, but Judge McKinney has managed its complex docket effectively, efficiently and fairly.

For his distinguished service, Judge McKinney has properly earned the respect and admiration of his peers and his community.

As the Indianapolis Star reported this May 5, "Attorneys who've pleaded for their clients in McKinney's court endorse him" for the federal bench because "[t]hey have been impressed by his scholarship and speed in making decisions in a court where many prominent lawsuits have been filed."

According to a September 24, 1986 editorial published in the Daily Journal of Franklin, the Johnson County seat, since Judge McKinney was elected Circuit Court Judge in 1978, ". . . the high standards of his court and his clear, logical and fair application of the law has drawn acclaim from all quarters. He is precisely the sort of man our nation needs on the federal bench. He possesses knowledge, compassion and commitment to his work. He is a family man who believes in this nation and has been willing to serve his community in a wide variety of ways apart from his official duties."

Mr. Chairman, I believe the evidence is clear that Judge McKinney is fully qualified to serve as a U.S. District Court Judge for the Southern District of Indiana.

I commend you, Mr. Chairman, and the members of this Committee for holding this hearing so soon after the President submitted this worthy nominee for your consideration. I thank you, too, for allowing me this time to speak on behalf of Judge McKinney, and I urge you to act on his nomination in the same prompt and favorable way you have considered the five Indiana federal district court nominees who have preceded him since 1981.

Senator **HEFLIN**. Thank you, Senator Quayle. We are delighted to have your testimony here in support of Mr. McKinney.

Senator Thurmond, do you have some questions?

Senator **THURMOND**. I have no questions. I will be very pleased to support this nominee. I find no reason I should not. I congratulate him upon his appointment to this high position. I congratulate him for having the endorsement of both of his fine Senators here, and I see no reason why your appointment should not go through without delay and I am sure it will with the help of this fine man here.

Judge **McKINNEY**. Thank you, Senator.

Senator **HEFLIN**. You are trying to apple polish me a little bit? [Laughter.]

Mr. McKinney, Judge McKinney, the Federal courts are faced with increasing numbers of highly complex cases involving multiple parties and extensive pretrial discovery. Have you handled many complex cases as a State court judge? And please give us some examples of the problems you have encountered in your management of complex litigation, since I understand you have handled some complex cases.

Judge **McKINNEY**. Yes, I have.

Senator **HEFLIN**. Pardon me. I see Senator D'Amato here and I do not want to hold him up because he is busy. Maybe we should interrupt the hearing here; if Senators Lugar and Quayle want to be excused, they may do so.

Senator D'Amato, would you like to come forward and speak for the nominee.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'Amato. Thank you very much, Mr. Chairman.

Mr. Chairman, thank you for your courtesy and for giving me the opportunity to present a most distinguished jurist, David Larimer.

Also, Mr. Chairman, I am pleased to be able to submit a statement and ask that it be submitted in the record in its entirety, a statement from our senior Senator, Senator Moynihan, that warmly and strongly supports Judge Larimer for the position as Federal District Court Judge in the Western District of New York. So I would like to make that submission.

Senator Heflin. Without objection, it will be received and made a part of the record.

[The statement of Senator Moynihan follows:]

Prepared Statement by Senator Daniel Patrick Moynihan

Mr. Chairman, I am pleased to join my colleague and friend from New York, Senator D'Amato, in supporting the nomination of David G. Larimer to be United States District Judge for the Western District of New York. I should also like to congratulate Mr. Larimer on his nomination. I know he will assume a heavy caseload, 600–700 cases per year, and so I wish Mr. Larimer, Karen, and their three children well as they all assume this new challenge.

Although I have known Mr. Larimer for just a short while, if confirmed, I am confident he will use his four years experience as United States Magistrate for the Western District of New York and life-long knowledge of the Rochester area to good effect. Mr. Larimer seems a dedicated practitioner of legal procedures and precedent, and I am impressed with his stated commitment to impartiality. In response to the Committee's written questions, Mr. Larimer notes, "As a United States Magistrate, I have tried to be fair and courteous to all who appear before me. This type of sensitive treatment is important if litigants are to believe that the courts are truly open to all."

Mr. Chairman, I would urge the Committee to give this nomination speedy approval.

Senator D'Amato. Mr. Chairman, I have but a brief statement, nonetheless it should not go without note that Mr. Larimer, who is the present Magistrate in Western New York, brings to this position as the President's nominee to be U.S. District Judge for the Western District of New York, an outstanding background, outstanding in terms of his academic accomplishments—magna cum laude graduate from St. John Fisher College in New York, a graduate from the University of Notre Dame Law School—he is a distinguished litigator, both in the private but more particularly in the criminal sector, having served, Mr. Chairman, for a total of 5 years as an Assistant U.S. Attorney both here in Washington and in the Western District of New York. For the past 4 years, Mr. Chairman, Magistrate Larimer has done an outstanding job as the Magistrate of Western New York, after having been a former Assistant U.S. Attorney, and a former principal assistant for the fourth department of New York State Supreme Court, Appellate Division.

With his varied, intensive judicial experience and his personal qualifications and integrity I am certain he will make an outstanding judge. I know you have been introduced to his beautiful wife, Karen, who is not only a wonderful wife but a great inspiration to Judge Larimer.

So, Mr. Chairman, I am pleased and I am delighted to be here to endorse my good friend, David Larimer's candidacy. I know he has served our Nation so well, both as an Assistant U.S. Attorney and as a sitting Magistrate for the past four years, that he will be an outstanding Federal judge, one in whom we can all take great pride.

Thank you.

Senator **HEFLIN**. Thank you, Senator D'Amato. We are pleased that you would introduce him.

Mr. Larimer, if you want to just sit there, maybe we can have both of you here at the same time, and if Senator D'Amato wishes to be excused he may do so.

Senator **D'AMATO**. Thank you.

Senator **HEFLIN**. Senator Thurmond, do you have some questions?

Senator **THURMOND**. I just want to congratulate him upon his appointment to this high position. He is well qualified and he is certainly highly endorsed by his esteemed and able Senator from New York, Senator D'Amato, and with Senator D'Amato's help I feel sure you will get through soon.

Thank you.

Judge **LARIMER**. Thank you, Senator.

Senator **HEFLIN**. Judge McKinney, I believe we were asking you about complex cases, if you would go ahead and——

Judge **MCKINNEY**. Yes, Mr. Chairman. In fact, our court has been subjected to many complex cases, some that involved many plaintiffs without class action treatment and some that involved class action treatment with as many as 10 classes at a time. It is difficult, those kinds of cases are difficult to manage, but as we try to focus on the rules of ripeness and standing and we try to recognize that the burden of proof in all these cases has to be the same, we manage to bring them down into a number and divide them up into classes wherein we can handle those cases with some manner of competence.

We have had cases involving old folks' homes on breaches of contract and fraud in excess of 700 plaintiffs in that case. We handled a fairly complex case regarding, I think the total amount of the claim was well over a billion dollars regarding a lot of English citizens. We have had a lot of experience with those kinds of cases and, with the help of intelligent Johnson County and Marion County lawyers, we have been able to get through them.

Senator **HEFLIN**. All right, sir. Thank you.

Judge Larimer, your experience has been unusually varied. You have been a law clerk to a Federal judge and the chief law assistant for a State appellate court. You have been a Federal prosecutor and a private practitioner, with specialty in litigation. Of course, for the last 4 years you have been United States Magistrate. How do you think this variety of experience prepares you to assume the duties of a U.S. District Court Judge?

Judge **Larimer**. Mr. Chairman, I would hope that that background would help me a great deal. I think I have seen all sides of the system. I started my career as a law clerk for a Federal judge here in Washington, Judge Joseph McGarraghy. I have, as you say, been a prosecutor for 5 years. I was defense counsel while I was in private practice. I have seen the appellate side of the law, working as the chief appellate law assistant for the State appeals court, and especially my tenure as United States Magistrate for the past 4 years. I have been deeply involved in the Federal system and I would hope all of that experience would serve me well in this very difficult and responsible job of being a United States District Court Judge.

Senator **Heflin**. All right sir. There are other members of the committee that have a number of questions they would like for you to answer. We will submit these to you and let you answer in writing. If you would, get them back within the next week, so we can try to move forward on these nominations.

Any further questions?

Senator **Thurmond**. Thank you, Mr. Chairman.

I have a question here about an answer you made on your—to save time, I will just submit it to you in writing. I have no further questions.

Thank you.

Senator **Heflin**. The hearing is adjourned.

Thank you.

[Whereupon, at 2:46 p.m., the committee was adjourned.]

[The questions and answers follow:]

WRITTEN QUESTIONS FOR LARRY McKINNEY

1. Some people have questioned the ability of our judicial system to adjudicate "mass tort" cases, which may involve hundreds or thousands of parties, and complex scientific evidence. How do you respond to this criticism? Barring any changes in the law, the federal court can expect to see more and more of these cases. What can a judge do to minimize the stresses these cases place on the judicial system?

   1. Mass tort litigation in fact stretches the fabric of the federal system. Any single court addressing itself to hundreds or thousands of plaintiffs in the same case with complex scientific evidence must address unique problems of management. Assuming that the requirements of class action litigation can be met by the proposed mass tort case, judicial management must begin at once.

      Pre-class determination discovery may be regulated by the court. Effective and numerous pre-trial conferences will assist in keeping the issues well defined and in keeping attorneys together on the issues. An ample use of magistrates and masters may be helpful. Post-class determination discovery must be monitored with specific orders.

      The court may consider a bifurcation of the trial, separating the issues of liability and damages. The court may consider a representative trial including both liability and damages for a small group of plaintiffs. The court may consider increasing the number of classes where appropriate or dividing the classes into categories for liability, damage or settlement purposes.

      A vigilant and prepared judge aware of the need for constant attention can help a great deal to minimize the problems of mass tort litigation. The judge needs to maintain a firm even-hand on the litigation. The judge needs to be sensitive to the alternatives for trial such as bifurcation and those other alternatives listed above.

2. Nearly all of your legal experience has been in the state court of Indiana. As a lawyer, you have had extensive trial experience but you have not tried any cases in federal court. For the last eight years, you have been a trial court judge in the state system. If you are confirmed, you will have to make the transition to a federal court system with which you are not too familiar. In your view, what is the major challenge facing you in making this transition, and how do you plan to meet it?

   2. The greatest challenge that I face in the transition from state court to federal judge is in developing a working familiarity with the Federal Rules of Trial Procedure and the Federal Rules of Evidence. Our Indiana Rules are not so dissimilar as to make this an overwhelming task. Seminar attendance and study should ease the transition process.

3. As a state court judge, you have had extensive experience in one of the most difficult responsibilities of any judge: sentencing convicted defendants. What is your philosophy of sentencing? What are the most important factors that you take into account in sentencing decisions? The United States Sentencing Commission has recently issued sentencing guidelines that will take effect in the fall unless modified by the Congress. These guidelines will substantially narrow the discretion that federal judges now enjoy in the field of sentencing. Have you had experience with sentencing under a guideline system? Do you anticipate any difficulties in adjusting to a sentencing system in which judicial discretion is substantially limited?

   3. Sentencing convicted individuals has been a substantial portion of my responsibility as a state court judge. In Indiana there is a range of discretion in any given sentence, which range depends upon the legislatively determined class of the crime and legislatively mandated aggravating and mitigating standards. My sentencing has been characterized by a concern for the victim, the circumstances surrounding the crime, the nature of the crime, the individual defendant, and the need for a fair and consistent pattern of sentencing. I am guided by the philosophy that a convicted defendant should be held responsible for the crime he commits with a view toward punishment and rehabilitation.

      I am a member of the Judicial Reform Committee, a committee of the Indiana Judicial Association. Our committee, in recognition of the need for sentencing guidelines, both as an educational tool for the sentencing judge and as an instrument to help satisfy a need for judicial consistency, has recently developed guidelines for the Indiana judiciary. The experience is new but helpful. I foresee no difficulties in drawing upon the assistance of legislative sentencing guidelines.

4. Your questionnaire responses refer to several complex cases in your court which were settled before or during trial. About one case, Allen v. Presbyterian Housing, which involved over 700 plaintiffs in ten classes, you wrote, "the case was settled after jury selection at the close of judicially augmented settlement negotiations." What are "judicially augmented settlement negotiations", and what role did they play in the settlement of this case? In general, what is the proper role of a trial court judge in facilitating settlements in order to make a trial unnecessary? Do you think you have been successful in fulfilling this role as a state court judge?

   4. When I use the term judicially augmented settlement, I am referring to the judicial process of assisting in the resolution of a case by settlement. The process does play a role in case and calendar management. In order to successfully augment the settlement process, the judge must be very much aware of the nature and progress of the case. The judge must be able to command the respect of

the attorneys in the case. The judge must be aware of the weakness and strength of both sides of the case and be able to relate those strengths and weaknesses to both sides without predicting the judge's response to those weaknesses or strengths. The judge must be experienced enough to be able to evaluate a case and know when to begin intervention in the settlement process. Each of these factors may play a bigger role in one case than another and some cases require more generous portions of all these factors than do others.

I think the court has an important role to play in settlement negotiation under the circumstances outlined in the first paragraph. There is a time to initiate settlement, a time to assist in settlement, and a time to leave it alone.

I have enjoyed success in this area. I have no statistics to show the degree of judicial involvement in settlements. A vast majority of our cases are settled, some by judicial assistance and some by attorney wisdom.

In the case to which the question refers, I had been close to the case from the beginning. I had narrowly defined the classes, presided over every pre-trial, every discovery problem, and every argument of any nature. I was aware of strengths and weaknesses on all sides. After jury selection, facing a multi-week trial, I held a settlement conference among respectful and knowledgeable attorneys. I made suggestions and the case was settled.

AFFIDAVIT

I, LARRY J. McKINNEY, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

DATED: July 1, 1987

Larry Mc

LARRY J. McKINNEY

Subscribed and sworn to before me this 1st day of July, 1987.

Beverley Hart

BEVERLEY L. HART, CLERK,
JOHNSON CIRCUIT COURT

(SEAL)

My Term Expires:
December 31, 1987

RECEIVED MAY 1 8 1987

QUESTIONNAIRE FOR JUDICIAL NOMINEES

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

David G. Larimer

2. Address: List current place of residence and office address(es).

Office address: 100 State Street, Room 260
Rochester, New York 14614

Home address:

3. Date and place of birth.

Rochester, New York on March 3, 1944.

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

Karen M. Moore (Larimer)
Spouse employed as Director of Alumni Relations - Nazareth College
4245 East Avenue, Rochester, New York 14618

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

St. Andrews Seminary, Rochester, New York from September, 1962 to May, 1964.

St. John Fisher College, Rochester, New York from June, 1964 to August 1966: B.A. Degree, Magna Cum Laude, Political Science.

University of Notre Dame Law School from August, 1966 May 1969: J.D. Degree.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Monroe County Bar Association
  Board of Trustees: 1985-1987

Pittsford Little League:
  President - 1986-1987
  Board of Directors 1984-1987.
Advisory Board of Rogers House (ex-offender outreach program) connected with Corpus Christi Church, Rochester, New York 1986-1987.

See Also Answer to No. 17

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Magna Cum Laude graduate from St. John Fisher College in 1966.

Full tuition scholarship, Notre Dame Law School, 1966-1969.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Monroe County Bar Association
  Board of Trustees: 1985-1987
  Judiciary Committee (reviews qualifications of prospective judicial candidates) 1983-1985.
  Trustee Liaison for Judiciary Committee: 1986-1987.
  Trustee Liaison for Disability Committee: 1986-1987.
  Trustee Liaison for Long Range Planning Committee: 1986-1987.
  Selection Committee for Recipient of 1987 President's Award.
  Bench-Bar Committee: 1986-1987.
  Courts Committee: 1981-1982.
  Committee to Establish Standards for Public Defender: 1976-1977.

District of Columbia Bar Association: 1975-present
New York State Bar Association: 1975-1978; 1982-1985.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational "public interest" law, etc.).

None.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

    New York--------------------------------1970
    Washington, D.C.-----------------------1970
    U.S. Court of Appeals, D.C. Circuit---1970
    U.S. District Court,
    Western District of New York----------1973
    U.S. Court of Appeals, 2d Circuit-----1976
    U.S. Supreme Court--------------------1980

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

    None.

13. Health: What is the present state of your health? List the date of your last physical examination.

    Excellent. My last complete physical was in June 1986.

14. Judicial Office (if applicable): State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

    I have been United States Magistrate for the Western District of New York since 1983. I was appointed by the District Court Judges in the District.

    As Magistrate I have handled civil trials with consent of the parties. Civil and criminal motions and other matters are referred to the Magistrate by the District Court. In my court, the Magistrate handles all discovery procedures and discovery motions as well as all criminal motions. All preliminary criminal matters such as arraignment, bail applications, appointment of counsel, arrest warrants, search warrants and scheduling orders are handled by the Magistrate. All petty and misdemeanor criminal trials are also handled by the Magistrate. In addition, the Magistrate handles habeas corpus petitions and social security review cases.

15. Citations: If you are or have been a judge, provide citations for: (1) the ten most significant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

(1) The following are ten significant opinions that I have written as Magistrate:

1. Walter S. Taylor v. Taylor Wine Co., et al - Civ. 83-887C
2. All Weather, Inc. v. Edstar Construction Co., Inc. - Civ. 85-567T
3. Marion D. Scipioni v. State of New York, et al - Civ. 81-325T; 81-579T; 83-520T
4. Alphonse McCullough v. Delco Products Division, et al - Civ. 83-787T
5. Patricia A. Flanagan v. Travelers Insurance Company 111 F.R.D. 42 (W.D.N.Y. 1986) - Civ. 84-860T
6. Guerino DeRosa, et al v. United States Development of Housing and Urban Development, et al Affirmed by District Court, August 8, 1985; Affirmed by Second Circuit, 787 F.2d 840 (1986) - Civ. 83-484T
7. E. Philip Saunders, et al v. CCC Advisors, Inc., et al Affirmed by District Court, July 2, 1985 - Civ. 83-1443T
8. United States of America v. Albert Tantalo, et al Affirmed by District Court, July 1, 1985 - Civ. 83-132T
9. United States of America v. Edward John Roder Affirmed by District Court, December 17, 1986 Cr. 85-198T
10. Church of Scientology International, et al v. The Elmira Mission of the Church of Scientology, et al - Civ. 85-412T

(2) The following are appellate opinions whereby decision was reversed.

1. DeGroote v. United States - Civ. 85-465, filed October 25, 1985 (unpublished), reversed by United States District Judge Michael A. Telesca on April 11, 1986 in an unpublished decision. (District Court reversed my decision to enforce IRS summons).

(3) Opinions on federal or state constitutional issues.

1. United States v. Guerrero - Cr. 85-31, filed December 10, 1985 (unpublished) [report to District Court recommending denial of defendant's motion to suppress evidence seized incident to arrest and pursuant to search warrant].

2. United States v. Betances - Cr. 85-113, filed April 18, 1986 (unpublished) [report to District Court recommending denial of defendant's motion to suppress identification and to suppress evidence seized at time of arrest].

3. United States v. Vespa - Cr. 85-37, filed June 14, 1985 (unpublished) [report to District Court recommending denial of defendant's motion to suppress statements and to suppress evidence].

4. United States v. Tantalo - Cr. 83-132, filed March 5, 1985 (unpublished) [report to District Court recommending denial of defendant's motion to suppress statement and to suppress evidence].

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

In the fall of 1981, I ran unsuccessfully as the Republican candidate for Monroe County (New York) District Attorney.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

POSITION	ADDRESS	DATES
1. Law Clerk	Hon. Joseph C. McGarraghy (deceased), U.S. District Judge, Washington, D.C.	Sept.'69-Sept.'
2. Assistant United States Attorney Washington, D.C.	U.S. Attorneys Office U.S. Courthouse Washington, D.C.	Sept.'70-June'7
3. Assistant United States Attorney Rochester, N.Y.	U.S. Attorneys Office U.S. Courthouse Rochester, New York	June '73-June'7
4. Private Practice-Associate	Beckerman, Davidson, Cook, & Fink, (now Davidson, Cook, Fink & Gates), 900 First Federal Plaza, Rochester, New York	June '75-May'78
5. Private Practice-Sole Practitioner	Lapine & Larimer Reynolds Arcade Building Rochester, New York	May '78-Apr.'79
6. Adjunct Instructor of Real Estate	St. John Fisher College Rochester, New York	Sept.'78-July'8
7. Chief Appellate Law Assistant, Appellate Division Supreme Court, Fourth Department	Appellate Division, Supreme Court, Fourth Department, 501 Hall of Justice, Rochester, New York	Apr. '79-July '

8.	Personal Law Assistant to Hon. John Doerr	Appellate Division, Fourth Department, Buffalo, New York	Jan. '82-May '8
9.	Attorney-Private Practice-Partner	Greisberger, Zicari, McConville, Cooman, & Morin, 25 East Main Street, Suite 500 Rochester, New York	June '82-Oct. '
10.	United States Magistrate Western District of New York	260 U. S. Courthouse Rochester, New York	May '83-present

b. 1. What has been the general character of your practice, dividing it into periods with dates if its character has changed over the years?

Since law school I have specialized only in litigation in both state and federal court as a practitioner, law assistant to judges and now as a United States Magistrate.

As an Assistant United States Attorney in Washington, D.C. and in Rochester, New York for five years my specialty was primarily criminal trial work although there was substantial civil litigation in the Rochester office and some civil appellate work in Washington, D.C.

In the Washington office, in addition to trial work, I specialized in appellate work spending approximately one and one-half years in that section of the office.

From 1979 to 1981, as Chief Appellate Law Assistant, I supervised the legal work of ten lawyers who clerked for the Fourth Department and I worked directly for the Presiding Justice.

As a partner in the Greisberger, Zicari law firm , I specialized in litigation, both civil and criminal. This included a broad range of civil litigation including negligence, contract, medical/hospital litigation, and matrimonial matters.

As United States Magistrate, I have a full range of judicial duties, both civil and criminal in the Federal Court in Rochester, New York.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Former clients were individuals, small businesses and a medium-size hospital.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

Throughout my practice I have appeared regularly in court. My litigation experience was extensive during my stint as an Assistant United States Attorney in Washington, D.C. and in Rochester, New York from 1970 to 1975. In the Washington office I handled a full range of felony and misdemeanor criminal cases in the District of Columbia Superior Court and in the United States District Court. I also had extensive appellate experience. Throughout my experience as an Assistant United States Attorney I was in court virtually every day.

During the time I was in private practice, from 1975 to 1979 and again from 1982 to 1984, I specialized in litigation and appeared in both state and federal court regularly. In private practice I would estimate that my practice was 80% in state court and 20% in federal court.

While a partner with the Greisberger, Zicari law firm, my entire practice was litigation. I spent approximately 40% in criminal matters, 40% in civil matters including personal injury, matrimonial, commercial, contract and 20% in various administrative proceedings before hospital committees or boards of directors concerning questions of professional competence or loss of medical privileges at various hospitals throughout the Rochester, New York area.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trial was:
   (a) jury;
   (b) non-jury.

As an Assistant United States Attorney I estimate that I had 30 to 35 criminal trials. My appellate experience was also extensive. I briefed and argued at least 30 cases before the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit and approximately 3-4 cases before the Second Circuit Court of Appeals.

While in private practice I estimate that I tried 12 cases to verdict. I also had 4-5 appellate proceedings before the Appellate Division, Fourth Department.

In each trial, both in the United States Attorneys Office and in private practice, I was sole counsel. Forty percent of the trials were jury, the rest non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. Monroe - Livingston Sanitary Landfill, Inc. v. Town of Caledonia. Bench trial before Justice Austin W. Erwin (retired), Livingston County Supreme Court, in 1977.

I represented plaintiff at trial only. Trial lasted approximately one month. Defendants were represented by Patrick M. Keefe, Esq., 5 State Street, Caledonia, New York, (716-538-4727). Verdict for defendant affirmed on appeal in Appellate Division, 72 AD2d 957 (1979) and in Court of Appeals, 51 NY2d 579 (1980).

Issue involved the ability of a town to restrict the amount of refuse from outside the town deposited into a New York State approved landfill located within the town.

2. People v. Ahmet Soler. Three-week Medicaid fraud criminal trial in Monroe County Supreme Court before Justice Arthur B. Curran, in February 1984. I represented the defendant and my adversary was Ralph W. Cox, II, Assistant Attorney General, 109 South Union Street, Suite 300, Rochester, New York 14607 (716-262-2860).

The trial concerned a multi-count Medicaid fraud indictment concerning violation of various Medicaid regulations by a dentist. The defendant was acquitted of all felony charges and convicted only of misdemeanor charges.

3. United States v. Daniel Rucker. This was a criminal jury trial in United States District Court for the Western District of New York before Hon. Thomas C. Platt (sitting by designation) in 1977. This was a one-week bank robbery trial. I represented the defendant at trial and on appeal. His conviction was affirmed by the Second Circuit at 586 F.2d 899 (1978). A co-defendant was represented by Michael R. Wolford, Esq., Nixon, Hargrave, Devans and Doyle, 2200 Lincoln First Tower, Rochester, New York (716-546-8000). My adversary was Eugene Welch, Assistant United States Attorney. His address is now Eugene Welch, Assistant Attorney General in Charge, New York State Attorney General's Office, 144 Exchange Boulevard, Rochester, New York (716-546-7430).

4. United States v. Louis Carini. This was a criminal jury trial in United States District Court for the Western District of New York before the Hon. Harold P. Burke (deceased). I represented defendant at trial and on appeal. Defendant was convicted of failing to

deposit into a trust account taxes withheld for his employees. His conviction was reversed on appeal by the Second Circuit due to violation of his Sixth Amendment right to a speedy trial. 562 F.2d 144 (1977). My adversary was Assistant United States Attorney Gerald J. Houlihan. His present address is Steele, Hector & Davis, Southeast First National Bank Building, Miami, Florida 33131 (305-577-2800).

5. Reardon v. Ihrig. This was a one-week personal injury jury trial in Monroe County Supreme Court before Justice Arthur B. Curran, in October 1983. I represented plaintiff in this personal injury action and the jury awarded a verdict in his favor of $125,000 in connection with a serious motorcycle accident. My adversary was Harold C. Bayer, Esq. (retired), Bayer and Smith, 25 East Main Street, Suite 202, Rochester, New York.

6. Freeman v. Freeman. This was a bench trial before Justice Elizabeth W. Pine in Monroe County Supreme Court in 1976-1977. This was three-week divorce and child custody case. I represented plaintiff. Custody was awarded to defendant. My adversary was Raymond J. Pauley, Esq., 215 Times Square Building, Rochester, New York (716-232-1411).

7. United States v. Edward W. Newfield, United States District Court, Western District of New York, May 1974.

I represented the Government in this bank robbery trial before Judge Burke. The jury convicted defendant. My adversary was Michael R. McGee, 200 Summer Street, Buffalo, New York 14222 (716-883-7272).

8. Les Aspin v. Department of Defense, et al, 441 F.2d 24 (D.C. Cir. 1973). This was an appeal before the District of Columbia Circuit in 1973 in which I represented the Department of Defense, Secretary of State Melvin Laird and others on appeal in my capacity as an Assistant United States Attorney.

The case involved the request by Congressmen Les Aspin for disclosure under the Freedom of Information Act of a document called the Peers Commission Report which contained the Army's review of the so-called My Lai incident in South Viet Nam. The Court of Appeals affirmed the District Court's opinion that the entire report was exempt from disclosure.

9. Rodway v. United States Department of Agriculture, et al, 482 F.2d 722 (D.C. Cir. 1973).

I represented the Department of Agriculture on appeal in this proceeding before the D.C. Circuit in 1973 in my capacity as Assistant United States Attorney.

The case involved an action brought by the City of New York, the Commonwealth of Pennsylvania and the National Welfare Rights Organization against the Department of Agriculture for failing to establish food stamp coupon allotments that provided for a nutritionally adequate diet.

The District Court determined that the controversy was moot but the Court of Appeals reversed and remanded for further proceedings. I had no further participation in the case.

10. United States v. Richard A. Lee, 489 F.2d 1242 (D.C. Cir. 1973).

I represented the United States on appeal before the D.C. Circuit in 1973 in my capacity as Assistant United States Attorney.

This was an appeal from a murder-for-hire conviction against two defendants before District Judge John J. Sirica. The Court of Appeals affirmed the convictions.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

The litigation matters listed at No. 18 are among the most significant legal activities that I have pursued while in private practice.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

None

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

Although I do not foresee any potential conflict of interest concerning financial matters, if I did have a matter before me relating to a concern in which I had a financial interest, I would recuse myself from the matter. If the interest was sufficiently collateral, I would advise the parties of the interest and if any party raised objection, I would recuse myself.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None

4. Have you ever held a major position or played a major role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

    In the fall of 1981, I ran unsuccessfully as the Republican candidate for Monroe County (New York) District Attorney.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm. What time period is involved? What arrangements have you made to be compensated for your work on pending litigation?

    Not Applicable

6. Please complete the attached financial net worth statement in detail. (Add schedules as called for.)

    See attached Confidential Financial Statement attached as Pages 16 A and 16 B.

DAVID G. LARIMER

CONFIDENTIAL FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		
Cash on hand and in banks	3000	-
U.S. Government securities—add schedule	0	-
Listed securities—add schedule	106	-
Unlisted securities—add schedule	0	-
Accounts and notes receivable:		
Due from relatives and friends	0	-
Due from others	0	-
Doubtful	0	-
Real estate owned—add schedule	120000	-
Real estate mortgages receivable	0	-
Autos and other personal property	45000	-
Cash value—life insurance	7900	-
Other assets—itemize:		
IRA, Empire America/ Bank	4100	-
Mineral rights, 638		
acres in illinois		
(Schedule)	1000	-
Total assets	181106	-

LIABILITIES		
Notes payable to banks—secured/ auto	17000	-
Notes payable to banks—unsecured	0	-
Notes payable to relatives	0	-
Notes payable to others	0	-
Accounts and bills due	500	-
Unpaid income tax	0	-
Other unpaid tax and interest	0	-
Real estate mortgages payable—add schedule	72000	-
Chattel mortgages and other liens payable		
Other debts—itemize:		
credit card balance	2500	-
Total liabilities	91500	-
Net worth	89606	-
Total liabilities and net worth		

CONTINGENT LIABILITIES		
As endorser, comaker or guarantor	0	-
On leases or contracts	0	-
Legal Claims	0	-
Provision for Federal Income Tax	0	-
Other special debt	0	-

GENERAL INFORMATION	
Are any assets pledged? (Add schedule.)	NO
Are you defendant in any suits or legal actions?	NO
Have you ever taken bankruptcy?	NO

DAVID G. LARIMER
CONFIDENTIAL FINANCIAL STATEMENT

SCHEDULES

Listed Securities:

Two shares Marine Midland Bank common stock at $53 per share.

Real Estate Owned:

Residence at 15 Mill Valley Road, Pittsford, New York - $120,000.

Real Estate Mortgages:

First mortgage to Chase Lincoln First Bank, Rochester, New York with balance of $26,000.

Second real estate mortgage, line of credit, to First National Bank, Rochester, New York with balance of $46,000.

Mineral Rights In 638 Acres In Illinois As Follows:

1. .004167 interest in mineral rights in 160 acre tract in Jefferson County, Illinois. Average annual royalties from Sohio for 1985 and 1986 - $5.00.
2. .001875 interest in mineral rights in 160 acre tract in Marion County, Illinois. Average annual royalties from Ashland Oil for 1985 and 1986 - $48.00.
3. .00008682 interest in mineral rights in 10 acre tract in Marion County, Illinois. Average annual royalties from Texaco for 1985 and 1986 - $20.00.
4. .0000869 interest in mineral rights in four separate tracts in Marion County, Illinois totaling 308 acres. Average annual royalties from Mobil for 1985 and 1986 - $120.00.

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

(a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

(b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

(c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

(d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

(e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

I believe in the Constitution and its clear directive concerning separation of powers. Each branch of Government has its own role and one branch should not encroach on the role of another branch.

The judiciary's role is by definition limited. A judge's role is not to legislate what is "good" for the community nor is his role to carry out and implement legislative policies.

A judge must decide the cases that come before him based on the facts of the case and the relief sought. His role is not to fashion remedies to resolve all problems that exist in an area whether or not they are at issue in the litigation. His role is to decide the case before him.

A judge must not decide cases based on what he believes is "good" for society; his decision should only be based on his interpretation of what others have determined to be "good" as reflected in the Constitution and the laws enacted by Congress.

Within the proper framework, a judge should be an "active" judge. He should be diligent and aggressive. He should move cases with dispatch. He should work hard to develop his skills and to keep current in the law. He should take an active role to insure that the proceedings before him are fair and that each party who appears before him is treated with dignity. A judge must always recognize that his role is, by definition, limited. He should not seek to create a role greater than that established by the Constitution.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

As a United States Magistrate, I have tried to be fair and courteous to all who appear before me. This type of sensitive treatment is important if litigants are to believe that the courts are truly open to all. I am especially concerned with this in criminal cases at initial appearance proceedings where defendants often appear without counsel immediately after their arrest.

As a member of the Monroe County Bar Association and as a member of its Board of Trustees, I have been involved in several projects to help provide pro bono representation. In 1976-1977, I was a member of a special committee to establish eligibility standards for those requesting a public defender. In 1985-1986, I was involved with several others in the Bar Association in a project to arrange for the assignment of criminal appeals on a pro bono basis where the public defender could not handle the case because of a conflict. This emergency project was able to eliminate a large backlog in these appellate cases.

While in private practice, I was a member of the Lawyers Reference Service (free initial consultation with referred client with reduced fee arrangement). I also routinely took assigned criminal cases in both state and federal court.

I am presently on the Advisory Board of Rogers House which is connected with Corpus Christi Church in Rochester, New York. Although not directly related to pro bono legal services, the project is an ex-offender outreach program. Rogers House provides counseling, job training and a temporary residence facility for those released from prison.

QUESTIONNAIRE FOR JUDICIAL NOMINEES

Supplementary Response

DAVID G. LARIMER
Nominee for United States District Judge
Western District of New York

I. BIOGRAPHICAL INFORMATION (PUBLIC).

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am a member and Trustee of the Monroe County Bar Association; the Pittsford, New York Little League Board of Directors; and the Advisory Board of the Rogers House Program associated with Corpus Christi Church, Rochester, New York.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

I have had no lapses in membership.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

III. GENERAL (PUBLIC):

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I believe that my answer at III(2) in the original Questionnaire (p. 18-19) answers this question.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

I do not and have not belonged to any organization that discriminates.

3. (Judicial Nominees Only) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated.

There is no public selection commission in my district to recommend candidates for nomination to the federal courts. Senator Alfonse D'Amato had a screening committee that interviewed candidates for the district court vacancy. I submitted my name to that committee and was interviewed by them. I was not privy to their recommendations to Senator D'Amato.

I was interviewed on two occasions, in 1985 and 1986, by Department of Justice personnel in Washington. In approximately January 1987, I was advised by Department of Justice personnel, and it was reported in the media, that my name was being submitted to the White House for the position. On May 4, 1987, President Reagan advised me that he had submitted my name to the Senate.

4. (Judicial Nominees Only) Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or question? If so, please explain fully.

AFFIDAVIT

I, David G. Larimer, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

June 10 , 1987.

David G. Larimer
DAVID G. LARIMER

John M. DiMartino
NOTARY
My commission expires
March 31, 1988

AFFIDAVIT

I, David G. Larimer, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate

May 11, 1987
(Date)

David G. Larimer
DAVID G. LARIMER

John M. Di Martino 5/11/87
(Notary)
My commission expires 3/31/88

AMERICAN BAR ASSOCIATION
Standing Committee on
Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
Robert B. Fiske, Jr.
1 Chase Manhattan Plaza
New York, NY 10005

FIRST CIRCUIT
Ralph I. Lancaster, Jr.
One Monument Square
Portland, ME 04101

SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
Jerome J. Shestack
Suite 3600
1600 Market Street
Philadelphia, PA 19103

FOURTH CIRCUIT
James A. Howard, Sr.
1410 First Virginia Bank Tower
101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
Gene W. Lafitte
One Shell Square
50th Floor
New Orleans, LA 70139

SIXTH CIRCUIT
John C. Elam
52 East Gay Street
Columbus, OH 43215

SEVENTH CIRCUIT
Joan M. Hall
One IBM Plaza
Suite 4300
Chicago, IL 60611

EIGHTH CIRCUIT
James W. Hewitt
P.O. Box 80268
Lincoln, NE 68501

NINTH CIRCUIT
J. David Andrews
1900 Washington Bldg.
Seattle, WA 98101
Samuel L. Williams
16th Floor
700 S. Flower Street
Los Angeles, CA 90017

TENTH CIRCUIT
James A. Clark
303 East 17th Avenue
Suite 1100
Denver, CO 80203

ELEVENTH CIRCUIT
M. Roland Nachman, Jr.
Winter Bldg.
2 Dexter Avenue
P.O. Box 78
Montgomery, AL 36104

DISTRICT OF COLUMBIA
CIRCUIT & FEDERAL
CIRCUIT
James J. Bierbower
International Square
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1875 Eye Street, N.W.
Washington, DC 20006

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May 6, 1987

RECEIVED MAY 08 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: DAVID G. LARIMER
United States District Court
Western District of New York

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of David G. Larimer for appointment as Judge of the United States District Court for the Western District of New York.

Our Committee is unanimously of the opinion that Mr. Larimer is "Well Qualified" for this appointment.

Sincerely,

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name.

   1. Larry J. McKinney.

2. Address: List current place of residence and office address(es).

   2. Residence:

   Office:
   Johnson County Courthouse
   Franklin, Indiana 46131
   (317) 736-3705

3. Date and place of birth.

   3. July 4, 1944
   St. Joseph Hospital
   South Bend, Indiana

4. Marital Status (include maiden name of wife or husband's name). List spouse's occupation, employer's name and business address(es).

   4. Carole Jean Marie Lyon. She is employed by Franklin College, Franklin, Indiana as a part-time Instructor in Education, Sociology and Psychology.

5. Education: List each college and law school you have attended, including the dates of attendance, degrees received, and dates degrees were granted.

   College:

   McMurray College, Jacksonville, Illinois
   Fall 1962 through Spring 1966 , B.A. 5-66

   Law School:

   Indiana University School of Law, Bloomington, Indiana
   Fall 1966 through Spring 1969, J.D. 5-69

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutiuons and organizations, nonprofit or otherwise, including farms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

   6. Private housepainting contractor, Bloomington, Indiana.
   Summers of 1966, 1967 and 1968.
   Law Library, Indiana University, Bloomington, Indiana,
   Academic years 1966-67, 1967-68 and 1968-69.

7. Military Service: Have you had any military service?

   7. No.

8. Honors and Awards: List any scholarships, fellowships, honorary decrees and honorary society memberships that you believe would be of interest to the Committee.

   8. In the academic year 1965-66 I was a member of the Order of the Tartan, an honorary academic leadership organization.

9. Bar Associations: List all bar associations, legal or judicial_ related committees or conferences of which you are or have been a member and give the titles and dates of any office which you have held in such groups.

   9. I am currently a member of the Indiana Council of Juvenile and Family Court Judges, a member of the Johnson County Bar Association and the Indiana Judges Association. I have served on the Judicial Reform

Committee of the Indiana Judicial Association since 1984. I have served on the panel for the Indiana Continuing Legal Education Foundation on two occasions. On April 9, 1982 I spoke at a seminar on products liability. In the Fall of 1985 I served as Judge on a program dealing with post traumatic stress syndrome.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list any other organizations to which you belong (such as civic, educational, "public interest" law, etc.

10. Indiana Judges Association.

11. List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

11. Admitted May 1970 before the Supreme Court of the State of Indiana and the U.S. District Court, Southern District of Indiana. Admitted to practice before the Federal 7th Circuit Court of Appeals 1975.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written. Please supply a copy of any significant speech by you on constitutional law or national policy. If there were press reports about the speech, and they are readily available to you, please supply them.

12. None.

13. Health: What is the present state of your health? List the date of your last physical examination.

13. The present state of my health is excellent. My last general physical examination was August 14, 1986 with Dr. Paul D. Reynolds, 597 West Jefferson Street, Franklin, Indiana, 317-736-9833.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

14. I was elected in the November 1978 General Election to the position of Johnson County Circuit Court Judge. I was re-elected in November 1984 for another six year term. The Johnson County Circuit Court is a constitutional court of general jurisdiction without limitation. I serve there today.

15. Citations: If you are or have been a judge, provide citations for (1) the ten most significaant opinions you have written; (2) a short summary of all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and, (3) significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions.

15. Included with ten significant opinions I have written are copies of the opinions and citations to the appellate opinions if appealed. The trial Court opinions are not published.

1) Mark Beery vs Schmidt et al. Unappealed.

2) McCracken vs Eli Lilly, 494 N.E. 2d 1289.

3) Indiana Department of State Revenue vs The Kroger Company, 453 N.E. 2d 1175.

4) Ramshead vs Johnson County Plan Commission, 463 N.E. 2d 295.

5) Dotlich vs Dotlich Bros. Corp. et al, 475 N.E. 2d, 331

6) Jacobs vs City of Columbus, 454 N.E. 2d 1253

7) U. S. Allied Aggregate vs City of Indianapolis. Unappealed.

8) Comprehensive Care Corporation vs Myers, 503 N.E.2d 451

9) Knue vs Board of Trustees of Indiana University. Unappealed.

10) Taylor Drug Stores, Inc. vs Indiana Alcoholic Beverage Commission et al, 479 N.E. 2d 932, 936-37 (Ind. Ct. App. 1986).

2) The following is a short summary of all appellate opinions in which my decisions have been reversed:

A) Indiana University Hospitals vs Elizabeth Carter, 456 N.E. 2d 1051 (1983). The Court overruled a motion for summary judgment in a negligence action involving alleged injury a Carter, a part time employee of Indiana University Hospitals, Carter having applied for and accepted Workmen's Compensation benefits. The law in Indiana was that Workmen's Compensation is an exclusive remedy and that once Workmen's Compensation is accepted no negligence action lies against the employer. Further, an award once approved, can not be set aside absent a showing of mistake, fraud, trickery, or duress. After examination of the affidavit of the plaintiff Carter, I determined that there were material questions of fact raised going to the foundation of Carter's agreement, Carter having alleged that misleading statements had been made to her to induce her to sign. The Appellate Court examined the same affidavit and concluded that the affidavit was filled with only conclusory opinions raising no fact issues. On that reading of the affidavit no issues having been raised, the Appellate Court found the granting of the motion for summary judgment to have been the more appropriate ruling.

B) Kendrick Memorial Hospital, Inc. vs Totten, 408 N.E. 2d 130. The Circuit Court was reversed for granting a summary judgment in favor of an architect and others against a hospital alleging poor workmanship and damage attendant thereto. During argument on the effect of an arbitration clause I inquired repeatedly of the plaintiff-appellant's attorney of the facts alleged to be in controversy. Receiving no answer and finding no such facts myself, I granted summary judgment. The Appellate Court found a material fact and reversed the decision.

C) James E. Burks vs C. H. Rushmore, 499 N.E. 2d 762. The Circuit Court granted a motion for summary judgment against a plaintiff who alleged that defendants had defamed him. Following the law in defamation cases, this Court found that the statute of limitations began to run in Indiana on a defamation case at the time the alleged defamation was published. The Appellate Court extended the discovery rule recently adopted in a products liability case dealing with birth control to defamation cases.

D) Consolidated City of Indianapolis vs Cutshaw, 443 N.E. 2d 1853 (1983). The Circuit Court granted a summary judgment in a declaratory judgment action brought by massage parlor owners and operators, an adult theater owner and adult book store owners against the City of Indianapolis alleging that the City's Zoning Ordinance 76-AO-2 was unconstitutional. No one at the hearing level raised the issue of the existence of material facts rendering a motion for summary judgment inappropriate. The Appellate Court reversed, finding material facts in issue.

E) Iglesias vs Wells, 441 N.E. 2d 1017 (1982). The Circuit Court granted a motion to dismiss in behalf of the Sheriff of Marion County. Plaintiff had served a sentence for public intoxication and had been released from jail late on a bitterly cold night. Plaintiff, an itinerate laborer who spoke no English, was inadequately clad against the elements, lost his shoes in the snow and suffered severe frost bite to his feet. Plaintiff sued alleging a duty on the part of the Sheriff to use reasonable care not to expose plaintiff to winter weather that might forseeably cause him injury. This Court found no such duty. The Appellate Court found that "a police officer must bear an incapacitated prisoner's condition in mind when releasing him and that whether the officer exercised reasonable care toward the prisoner will be judged in light of the prisoner's condition". The case was one of first impression.

F) Johnson County Rural Electric Membership Corporation vs Burnell, 484 N.E. 2d 989 (1986). The Circuit Court overruled the motion for summary judgment of the R.E.M.C. The R.E.M.C. was sued by plaintiff for malicious prosecution. The R.E.M.C. maintained that the probable cause finding by an independent magistrate that the plaintiff was guilty of deception and later conversions precluded a suit for malicious prosecution. No appellee's Brief was filed. There being no evidence by affidavit that the probable cause was fraudulently induced, the Appellate Court reversed.

G) Wabash Ford Truck Sales, Inc. vs Ford Motor Company, 472 N.E. 2d 611 (1984). The Circuit Court granted a motion for summary judgment on the pleadings in a case involving an allegation by the State of Indiana that Ford trucks purchased through Wabash Ford Truck Sales, Inc. were defective. Wabash Ford sought indemnity against Ford Motor Company based on a written indemnity agreement. The Circuit Court after an examination of the agreement concluded that the agreement was to protect the dealer based upon the theory that the workmanship performed at the factory was the sole cause of the damage. This Court found no such allegation. The Appellate Court finding that a general allegation of breach of warranty implied an allegation of production defect reversed the trial Court.

H) City of Greenwood vs Dowler, 492 N.E. 2d 1081 (1986). The Circuit Court reversed a decision of the Greenwood Police Merit Commission that had dismissed Dowler from the Greenwood Police Department. The lower Court found that the Commission's decision was not supported by substantial evidence. The issue before the Commission was whether after a suicide attempt, Dowler had a continued incapacity to perform her duties as a police officer because of emotional problems. The trial Court found no evidence of a continuing problem based on reports of psychiatrists and psychologists. The Appellate Court found from the lay testimony of the Chief that there was a continuing problem to be sufficient evidence. The decision of the Commission was reinstated.

I) Bonnie Pitts vs Johnson County Department of Public Welfare, 491 N.E. 2d 1013 (1986). On October 21, 1980 the Johnson County Department of Public Welfare filed its request that it might file a petition and take custody of Steven Clifford Pitts, alleging that the child was in need of services. Pursuant to the statute, a detention hearing was set for and held on October 27, 1980. The mother, Bonnie Pitts, and her attorney appeared on October 27, 1980 and evidence was heard. The petition had alleged that the child had been "voluntarily abandoned" by the mother. At the hearing, the mother denied abandonment and the matter was set for a fact finding hearing on December 2, 1980. The child remained with the Welfare Department, having been found to be a child in need of services, the mother having consented to the continuance of detention. The stated statutory goal of these procedures is to assist parents having difficulty with children and to reunite fragmented families. At this time the child was 4 1/2 years old.

The fact finding hearing was re-set for December 1, 1980 at which time the mother appeared in person and by counsel and voluntarily consented to termination of parental rights. Publication service was then made on the putative father and a hearing to terminate the parental rights of the putative father was set for January 20, 1981.

On January 19, 1981 the mother's attorney moved to continue the January 20, 1981 hearing alleging that the mother wished to recant her voluntary termination of parental rights. A hearing was set for February 19, 1981.

The mother, on February 17, 1981, filed her affidavit with the Court setting out her position for changing her mind. The mother moved to continue the February 19, 1981 hearing and the cause was continued until March 19, 1981. On March 19, 1981, evidence was heard, the mother's termination of rights was declared null and void, a home study was ordered on the mother's residence, the child continued in detention, and a fact finding hearing was set for May 28, 1981. That hearing was continued by the parties until July 20, 1981.

The mother did not appear on July 20, 1981, but she appeared by counsel. Evidence showed that the mother had moved to California and that the Welfare Department was conducting a home study of her California home and determined that if the home study proved satisfactory, the mother and child would be reunited. The Court found the child to be in need of services and continued detention. (Foster care placement.) The matter was set for dispositional hearing on August 25, 1981.

On August 19, 1981, a Welfare report was filed indicating that no word had arrived from California, but that when satisfactory word arrived, placement could be made. The August hearing was continued by agreement of the parties until September 9, 1981, and by the Court to September 22, 1981. The mother appeared through her counsel and again the order was made that as soon as California sent a satisfactory report the family could be reunited.

On January 6, 1984 a petition to terminate parental rights was filed.

On Janury 10, 1984 the mother's attorney withdrew alleging no contact with the mother since August of 1982. A hearing was set on April 11, 1984. The Welfare Department by affidavit alleged that the mother was nowhere to be found. The mother failed to appear on April 11, 1984. The Court continued the matter until April 30, 1984 with further effort to find the mother to be made.

New counsel entered appearance for the mother on May 11, 1984 asking for a continuance of the hearing to terminate parental rights. The motion was granted and the hearing was re-set for June 6, 1984. The mother continued that hearing until June 27, 1984. The mother continued that hearing until July 12, 1984. That hearing was continued by agreement until September 10, 1984. On September 5, 1984 the Welfare Department requested a continuance to depose social workers in California who were familiar with the mother. The continuance was opposed by the mother alleging that it was in the child's best interest to proceed immediately. The Court granted the continuance and set the hearing for November 1, 1984.

When the mother failed to file a medical release authorization so that Community Mental Health records in California could be secured, the Welfare Department asked that she be compelled to do so since California law required such an authorization. The Court ordered the mother to sign such an authorization. She asked this Court on October 19, 1984 to certify the Question for Interlocutory Appeal, refusing to sign the medical release.

A motion for rule to show cause was filed October 19, 1984 by the Welfare Department alleging that the mother had refused to comply with the Order of the Court. A hearing was held on these motions on November 1, 1984. The Welfare Department asked for default or that the mother be prohibited from presenting evidence in her defense. The motion for certification was overruled and the motion to show cause was re-set on November 30, 1984.

On November 30, 1984 hearing was held and the mother filed a motion to reconsider prior to filing a writ of prohibition seeking a determination by the Indiana Supreme Court that the Circuit Court was without authority to compel the signing of the medical release. The Court ordered that the motion for sanctions orally made by the Welfare Department on November 30th was properly made and granted, that the mother was in contempt for failure to comply with the

Court's Order, that the mother should be defaulted for failure to comply with the Court's Order, that the mother's counsel have until December 14th to proceed with any writ of prohibition, and that the Court would stay any sanction on the contempt until after the writ was decided.

On December 14, 1984 the mother filed a motion to extend her time to file her original action. On February 12, 1985 the mother filed a motion to correct errors addressed to the Court's ruling on the November 30, 1984 hearing. The motion was set on March 22, 1985. On March 5th this Court received notice of a hearing in the Supreme Court of Indiana regarding a writ of prohibition filed by the mother addressed to the authority of this Court to compel a release of medical information authorization. On March 6, 1985 a motion in opposition to entry of default was filed. The Department's motion for entry of default having been filed February 28, 1985, pending motions were set for March 22, 1985. The hearing was re-set for April 10, 1985. The writ of prohibition was denied, the Supreme Court finding that the trial Court had the authority to compel the mother to authorize the release of information from California.

On April 10, 1985 the mother filed her motion to terminate sanctions and tendered her signed authorization. The Court, after evidence and argument on April 10, 1985, overruled the motion to terminate sanctions and entered default against the mother and the father, thereby terminating the mother's parental rights. On April 17, 1985 this Court issued extensive Findings of Fact in support of its decision. Such was the nature of the case presented to the Court of Appeals.

The Court of Appeals found that this Court abused its discretion by not imposing a lesser sanction than default and for not allowing the mother, who was ordered to sign the authorization in October of 1984 and who didn't tender it for seven months, to conform to the Order, and for prohibiting her from speaking at the April 10, 1985 hearing.

J) In The Matter Of The Supervised Estate Of Mearl Hensley vs Jessie Hensley and Lorene H. Caton, 413 N.E. 2d 315 (1980). This case involved a Will which gave the right of "first refusal" on the "home place" to the Executor, a son. This Court set aside the estate's sale at the request of the other heirs to the son for the reason that there had been no other bids taken on the property. The Appellate Court decided that the Will language did not require a third party bid.

K) Indiana Environmental Management Board and Indiana Waste Systems, Inc. vs Town of Bremen, 458 N.E. 2d 672 (1984). This Court mandated the Indiana Environmental Management Board to terminate the operation of a landfill. This Court determined that the landfill was operating without a license and that it was the statutory duty of the board to terminate that operation. The Appellate Court determined that this was a discretionary function and therefore this Court was without the authority to issue the mandate.

L) Fankboner vs Schubert, 431 N.E. 2d 856. This Court refused to give an instruction to the jury telling them that if the motorcycle which was being operated by the plaintiff did not have its lights on then the plaintiff was guilty of contributory negligence. This Court felt since the only evidence in the case was that the light was on, no such Instruction was necessary. The Appellate Court concluded that there was and that the failure to give the Instruction was error. They based their conclusion on the testimony of the driver of the truck that he saw neither the cycle nor the light. The accident took place in broad daylight at a 90° angle.

M) Cochran vs. State, 429 N.E. 2d 672 (1981). This Court admitted evidence in a theft trial that had been taken from a truck at the scene of an investigatory stop. The trial Court determined that the stop was made pursuant to probable cause. The Appellate Court reviewed the same circumstances and concluded the stop was made without probable cause.

N) Campbell vs Railroadmen's Federal Savings, 443 N.E. 2d 81 (1982). This Court granted summary judgment on the issue of punative damages on the Campbells' breach of contract action against Railroadmen's. This Court found that the affidavits of the Campbells' raised no issue of material fact regarding the issue of bad faith and the Appellate Court disagreed.

O) Louis Moran vs State, 477 N.E. 2d 100 (1985). Louis Moran was indicted by a Grand Jury charging official misconduct. This Court on a motion to dismiss by the defendant Moran found that the crime charged was stated with sufficient certainty and the Appellate Court found that it was not.

P) Indiana State Highway Commission vs Bates and Rogers Construction, 448 N.E. 2d 321 (1983). This Court awarded Bates and Rogers an additional interest of 6% pursuant to a previously awarded judgment against the State of Indiana on a construction contract. This Court's interpretation of a second interest statute led it to conclude that the award was proper under the legislative scheme. The Appellate Court reviewing the same scheme found the application of the second interest charge not in comport with the legislature's intent.

Q) B & R Farm Services, Inc. vs Farm Bureau, 483 N.E. 2d 1076 (1985). This case involved Farm Bureau's coverage of a penalty assessed B & R by the Indiana Department of Natural Resources for a fish kill caused by an accidental release into a creek of some liquid fertilizer. B & R sought coverage and Farm Bureau denied coverage. The matter was submitted to the Court on cross motions for summary judgment and partial summary judgment. This Court found that the policy exclusion excluding claims arising from the placement of defective goods into the stream of commerce by the insured applied in this case.

> The Supreme Court disagreed pointing out that these claims have nothing to do with defect in product and are negligence claims rather than product liability claims.

It should be noted that to the best of my ability to find reversals, this is a complete list. There remains the possibility that I could have missed a reversal.

3) There are that I can recall no other significant constitutional cases than those listed in the preceeding lists of cases.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful condidacies for elective public office.

16. None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the address and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

a. Upon graduation from law school in the Spring of 1969 I was employed as clerk to the Indiana Attorney General until sworn in as a member of the Bar of the State of Indiana in May, 1970. On the same day, I was sworn in as a Deputy Attorney General where I remained until September 1971 when I opened an office along with Charles D. Rodgers at 107 South Walnut, Edinburgh, Indiana. On March 1, 1975 the Edinburgh office was closed to allow me to join the practice of James F. T. Sargent, 300 South Main Street, Greenwood, Indiana, where I remained until becoming Judge of the Johnson County Circuit Court on January 1, 1979. I am currently the Johnson County Circuit Court Judge in my second term, having run my second time unopposed.

The Edinburgh office was for all intents and purposes a one man office as Charles D. Rodgers continued as an Assistant Attorney General, resiging to become an attorney on Guam. Mr. Rodgers was in Guam when the Edinburgh office closed.

The Greenwood office was a two man office wherein I was a one-third partner.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

b. From June 1969 to May 1970 as clerk for the Indiana Attorney General, I assisted sections of the office that represented the Department of State Revenue and that wrote criminal appellate briefs. I wrote briefs on interstate commerce taxation questions and wrote briefs in the criminal appellate division.

As a Deputy Attorney General from May 1970 to September 1971, I specialized in State sales, adjusted gross and gross income taxation, appearing in Bankruptcy Court and in Circuit and Superior Courts around the State. Cases typically involved receiverships, adjusted gross income tax questions and the constitutional application of the Gross Income Tax Act to various corporate behavior.

From September 1971 to March, 1974, as essentially a sole practitioner in Edinburgh, Indiana, I dealt with typical small town problems, domestic relations, collection, bankruptcy, real estate, estate planning and settlement, criminal law, social security, small corporations, and personal injury. I became attorney for the Johnson County Memorial Hospital, abstracted for the Edinburgh State Bank and the Blue River Building and Loan.

From March 1974 to assuming the Bench on January 1, 1979 the nature of the general practice remained the same, but the number of cases increased. I represented the Zoning Board for the City of Greenwood for a year and a half until I resigned due to the press of other work. The Hospital took up more time. Specialities were in domestic relations, hospital law and zoning.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearance as in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

4. State the number of cases in courts of record you tried to verdict of judgment (rather than settled), indicating whether you were sole counsel, chief counse, or associate counsel.

5. What percentage of these trials were:
   (a) jury;
   (b) non-jury.

c. Eight years of the last 10 years I have spent on the Circuit Court Bench. In the 10 years prior to having been elected, I was in court frequently on domestic relations matters. In that time I tried two criminal jury trials and two personal injury trials to a jury. My practice was almost 95% in the State courts, having settled any federal cases I did have. I represented several clients in social security and workmen's compensation areas. My pratice was 75% civil and 25% criminal. Not more than 2% of my cases in that time period resulted in jury trials. Most cases were bench trials. I tried approximately 100 cases to judgment as chief counsel and approximately 20 cases to judgment as associate counsel.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the

party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) The case of Mueller Brass Co. vs Gross Income Tax Division was the first significant case in which I participated. I researched and wrote the Appellate Brief for the State of Indiana, although the ultimate responsibility for the brief was not mine. The case involved the constitutionality of the application of the Gross Income Tax Act to the proceeds of certain of Mueller Brass Company's activities in the State of Indiana. Mueller Brass Company was a Michigan corporation with its manufacturing plant in Michigan. Mueller Brass maintained a sales office in Indianapolis that served the needs of the southern half of the State of Indiana. In examining whether the nexus existed between the taxpayer and the taxing authority, the Court was sensitive to Indiana activity and to the possible exposure of the taxpayer of double taxation. While the case did not change the law and certainly was not a case of first impression, the specifics of the case provided the Court with an opportunity to guide both the Department and out-of-state corporations in similar matters. The case is cited at 265 N.E. 2d 704. The case is continually cited for proposition that it is the bundle of corporate activity that is examined to determine the constitutionality of the tax levy. The case was tried before Honorable Charles W. Applegate, Marion County Superior Court 7, Indianapolis, Indiana. Hugh Couch, deceased, was co-counsel and Alan Lobley, of Ice, Miller, Donadio & Ryan, Indianapolis, Indiana, 317-236-2100, was opposing counsel. This case was tried in the Fall of 1968.

2) The case of Indiana Department of State Revenue vs The Boswell Oil Company was a case of significance. I assisted at the trial, prepared the appellate transcript and was responsible for the appellate brief. The case involved the definition of "broker" as it applied to the operations of The Boswell Oil Company. If Boswell were a broker, they would be taxed in one manner and if not they would be taxed in another. The definition of "broker" had not been dealt with since 1895 and had never been defined as it applied to the Indiana Gross Income Tax Act. The case was further significant in that it cleared up a perceived inconsistency in the construction of tax statutes. The Act and its categories is construed in favor of the taxpayer and exemptions are construed against the taxpayer. The case is reported at 268 N.E. 2d 303. The case was tried before Honorable French T. Elrod, Judge Pro Tempore of the Marion County Circuit Court, Indianapolis, Indiana. T. Stephen Phillips, of Frost and Jacobs, Cincinnati, Ohio, was opposing counsel, and Richard H. Riegner, of White, Raub, Reis and Wick, Indianapolis, Indiana, 317-632-1348, was opposing co-counsel. This case was tried in the Spring of 1970.

3) Frank Purcell Walnut Lumber Company was a case of first impression in the area of taxation and interstate commerce. I was solely responsible for the argument and briefs in the summary judgment hearing adnd I wrote the Motion To Correct Errors. Purcell was an Indiana corporation doing business in Kansas City, Kansas. Purcell was wholly owned by an Indiana corporation. The essential issue was whether the State of Indiana could

constitutionally levy its gross income tax on income generated by an Indiana corporation authorized to and doing business outside the State of Indiana from sale to another Indiana corporation doing business in Indiana. In holding that when a product crosses a state line the revenue generated is not ipso facto immune to gross income tax, the Indiana Appellate Court closed a developing loophole and guided corporate tax planners. The case is found at 282 N.E. 2d 336. The case was tried before Honorable Robert W. Young, Judge of the Johnson Circuit Court, Franklin, Indiana. William H. Krieg, Robert E. Johnson and Jerry Williams, of Krieg, DeVault, Alexander and Capehart, Indianapolis, Indiana, 317-636-4341, were opposing counsel. The case was tried September 21, 1970.

4) The case of Madding vs Indiana Department of State Revenue involved the question of whether an intricately devised stock transfer was a sale or a corporate re-organization. If it were a re-organization, it was exempt from taxation. I wrote the appellate brief and prepared the transcript for appeal for the State. The case is significant both for its complexity of facts and for its having protected the integrity of corporate entities. The case is reported at 270 N.E. 2d 771. The case was tried before Honorable Ernest Tilly, Judge of the Knox Circuit Court, Vincennes, Indiana. James J. Lewis and Robert V. Kixmiller of the firm of Shake, Lewis, Lewis and Kixmiller, Vincennes, Indiana, 812-882-1303, was opposing counsel and Elmer Marchino, Indianapolis, Indiana, 317-638-7170, was opposing co-counsel. This case was tried in the Summer of 1970.

5) The case of Indiana Department of State Revenue vs Stark Wetzel involved definition of the term "wholesale grocer" for taxation purposes. Wholesale grocers were at that time taxed differently than other wholesalers. I assisted at trial, interviewed witnesses, wrote the trial briefs, and the Motion To Correct Errors, and assisted in the appeal. The statute defining wholesale grocers required that the entity in question be in the business of selling stocks of groceries, tobacco products and expendable household supplies. Stark Wetzel wholesaled meat as a substantial portion of its business. The case is significant because it extended the definition of wholesale grocer to include anyone who sells any grocery at wholesale. This decision lost the State a great deal of money to wholesale meat packers. The case is cited at 276 N.E. 2d 904. The case was tried before Honorable John Rochford, Special Judge of Marion County Circuit Court, Indianapolis, Indiana, and Ted D. Nering and Phillip S. Kappes, of the firm of Dutton, Kappes and Overman, Indianapolis, Indiana, 317-635-5395, were opposing counsel. This case was tried September 15 and September 16, 1970.

As related in answer to Question 18, the nature of my practice from the time I left the Attorney General's Office to the time I took the Bench was a small town practice. I tried no cases which fit under the category of significant litigation in the context of these answers. Certainly any divorce, modification, workmen's compensation, or personal injury case was significant to the party involved, but none involved issues resulting in appeal or issues the resolution of which would alter anyone else's practice.

Those cases were tried primarily before Judge Robert E. Smith, Johnson County Superior Court 1, Franklin, Indiana; Judge William Linebarger, Bartholomew County Circuit Court, Columbus, Indiana; Judge Robert W. Young, Johnson County Circuit Court, Franklin, Indiana; and Judge Sidney Showalter, Bartholomew County Superior Court, Columbus, Indiana. Attorneys involved representing opposing parties often included Tom G. Jones, 317-736-7174, G. Michael Loveall, 317-736-7174, C. Mark Tompkins, deceased, James K. Coachys, 317-736-4163, Jack Rogers, 317-738-2123, Joe N. VanValer, 317-888-1121, and John P. Wilson, 317-888-2683

19. Legal Activities: Describe the most significant legal activites you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in the matter. (Note: as to any facts requested in this question, please omit any informtion protected by the attorney-client privilege.)

19. Certainly the most significant legal activities that I have pursued have taken place since I have been on the Bench. These activities include only cases heard.

I have presided as Judge of the Johnson County Circuit Court since January 1979. On December 31, 1978 there were 2805 cases pending. In the years 1979 through 1985 there was 9484 cases filed. Although the Court have juvenile jurisiction these figures do not include juvenile cases other than Children In Need Of Services, During the seven years mentioned, our records show disposition of 10,341 cases. These statistics are not absolutely correct as some dispositions go uncounted and some new filings go uncounted. None are counted that don't exist. These dispositions include 119 jury trials, 50 of which were criminal, including 7 murder cases, one of which was capital. Sxity-nine civil trials include several lengthy 2 to 5 week products liability trials such as Bedan vs Rawlings, Cause Number 27,251, which was settled on appeal, one class action trial settled prior to verdict, and many complex cases.

The Court has presided over many difficult and intricate cases. One such case which ended in settlement was entitled Albersmeyer vs McCullough Oil, Cause Number 30,744, a case involving over 700 plaintiffs consolidated by agreement from five different States where similar suits had been filed. The McCullough case began as a Federal case involving alleged land fraud. The Federal Court in the Southern District of Indiana declined to accept jurisdiction. The individual plaintiffs then filed suit in five different States, including Indiana. The Indiana case was venued to Johnson County Circuit Court. The plaintiffs' attorneys in all five State were the same and the defendant's attorneys were the same. Johnson County was selected by the attorneys as the forum for trial. After many pre-trial hearings the case was settled. The plaintiffs from all five States were joined together in a settlement class that disposed of the entire litigation involving over 700 individual plaintiffs.

The Court presided over the case of Allen vs Presbyterian Housing, Cause Humber 33,638, a class action involving ten classes of plaintiffs. The case involved a retirement village in Greenwood, Indiana, and claims of breach of contract, fraud and trust involving an excess of 700 plaintiffs. The case was settled after jury selection at the close of judicially augmented settlement negotiations. The Court presided over numerous pre-trial arguments, defined the classes and held weekly conferences with the attorneys.

The Court in Perkins vs State, reported at 451 N.E.2d 354, dealt with significant search and seizure questions applying the U.S. Supreme Court case of New York vs Bolton (1981) 453 U.S. 454. This Court has dealt with many questions of substance which will not be further enumerated.

The Court has presided over three election recounts, one of which involved the contested election of David Evans and Dr. David Crane to the United States House of Representatives.

The Court administers a staff of five secretaries, four juvenile probation officers, two adult probation officers and a Juvenile Referee. The Court has no Commissioner and no law clerk. The Court's annual budget is in excess of $300,000.00.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. Describe all financial arrangements, stock options, deferred compensation agreements, future benefits, and other continuing relationships with business associates, clients or customers.

   1. Only the State Judges' Retirement Plan.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

   2. Any conflicts can be taken care of by disqualifications.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court?

   3. No.

4. Have you ever held a major position or played a major role in a political campaign?

   4. No.

5. If applicable, please describe the arrangements you have made to dissolve your financial interest in your law firm.

   5. Not applicable since I have been on the Bench for 8 1/2 years.

6. Please complete the attached financial net worth statement in detail.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			
Cash on hand and in banks	6,000	00	
U.S. Government securities—add schedule			
Listed securities—add schedule			
Unlisted securities—add schedule			
Accounts and notes receivable:			
Due from relatives and friends			
Due from others			
Doubtful			
Real estate owned—add schedule	85,000	00	
Real estate mortgages receivable			
Autos and other personal property	4,000	00	
Cash value—life insurance			
Other assets—itemize:			
Ind. Jud. Retirement Fund	18,727	00	
(IRA) Growth Fund of America	13,642	94	
(IRA) Strategic Invest. Fund	11,158	00	
Wife- Strategic	2,011	73	
Wife - Growth	11,827	70	
Total assets	152367	37	

LIABILITIES			
Notes payable to banks—secured			
Notes payable to banks—unsecured			
Notes payable to relatives			
Notes payable to others			
Accounts and bills due			
Unpaid income tax			
Other unpaid tax and interest			
Real estate mortgages payable—add schedule	11,681	02	
Chattel mortgages and other liens payable			
Other debts—itemize:			
Total liabilities	11681	02	
Net worth	152367	37	
Total liabilities and net worth	164048	39	

CONTINGENT LIABILITIES			
As endorser, comaker or guarantor			
On leases or contracts			
Legal Claims			
Provision for Federal Income Tax			
Other special debt			

GENERAL INFORMATION			
Are any assets pledged? (Add schedule.)	No		
Are you defendant in any suits or legal actions?	No		
Have you ever taken bankruptcy?	No		

III. GENERAL (PUBLIC)

1. Please discuss your views on the following criticism involving "judicial activism".

   The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government. Some of the characteristics of this "judicial activism" have been said to include:

   (a) A tendency by the judiciary toward problem-solution rather than grievance-resolution;

   (b) A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

   (c) A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

   (d) A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

   (e) A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

1. Controversy resolution within prescribed precedent and within prescribed rules of procedure and evidence is the constitutional and common law job description for the Federal Courts. Faithfulness to this description provides decisions that are grounded in a concern for objectivity and consistency. Decisions are objective in the sense that they reflect a studied recognition of the developed rules of procedure and evidence. Decisions are consistent as they reflect a concern for precedent. Court are asked on occasion to accomplish more than they were designed to accomplish. Court are on occasion tempted to accomplish more than they are asked to accomplish. These realities tug at the Judge's desire to conform judicial conduct to the job description.

When presented with requests for certification of classes in a class action controversy, Courts may be asked to accomplish more than they are designed to accomplish. In order to create a class, a Court must determine that class issues predominate over individual issues and that the class action proceeding is the superior method of adjudicating the controversy in question. Care must be taken in the effort to efficiently resolve many cases at once that the proof requirements for the individuals are not relaxed. Proof that each member of the class was damaged by the negligence of the defendant must not be obviated by the plaintiff's inclusion in a class. The Court must be certain that the nature or type of evidence needed for these plaintiffs to prevail is the same before a class is created. To do otherwise is to relax the burden of proof merely because of the number of plaintiffs.

In the case of Marbury vs Madison, Chief Justice Marshall pointed out an instance in which Courts are asked to accomplish that for which they were not set up to accomplish. "The province of the Court is solely to decide on the rights of individuals, not to inquire how executive officers perform duties in which they have discretion." Thus, it is not the province of the Federal Courts to interfere with the discretion of executive officers. Certainly the definitiion of executive discretion is the issue in some cases, but the principal remains clear.

Questions of standing and ripeness can invite a Court to attempt to do more than resolve controversy. The threshold question in these cases is, of course, is there a controversy and if there is does the plaintiff have standing to bring the controversy to the attention of the Court. Standing and ripeness questions often bring with them invitations to the Court to deal with problems of far reaching significance and often involve lawsuits effecting the general public. It is important that the Court be reminded of its job description when dealing with these issues.

It is generally true in our society that where there is a wrong there is a remdy. It is not necessarily true that for every wrong there is a remedy in a Federal Court. For the Federal Court the thought is not if there is a wrong we will find the remedy, the thought is if there is a wrong alleged, is there a common law, statutory or constitutional remedy. If not, the Federal Court should decline the invitation to do more than they were meant to do.

In conclusion, the resolution of controversies within the prescribed rules of precedent, procedure and evidence is the constitutional and common law job description of the Federal Court. An adherence to this description and the declining of invitations to do otherwise allows the Federal Courts to provide the service to our society for which they were created.

2. What actions in your professional and personal life evidence your concern for equal justice under the law? Describe what you have done to provide pro bono legal representation to the disadvantaged.

2. As a practicing attorney in Edinburgh, Indiana from September 1971 to March 1974, I encountered many occasions that required pro bono legal representation. Edinburgh, Indiana has a portion of its citizens in such economic condition that if there were no one willing to represent them at a reduced rate or at no cost, their legal needs would not be met. I met those community needs as a young lawyer. This included providing domestic relation representation, misdemeanor and minor felony representation.

During the early '70's Johnson County had no legal aid services. The Johnson County Bar Association met that need and a more equal distribution of pro bono work ensued. The work was placed on a round-robin system. I also provided pro bono work for the Johnson County Association of Retarded Citizens.

As my practice moved to Greenwood, Indiana and began to increase in scope, I continued to represent many of my Edinburgh clients. I also continued to support the Bar Association legal aid program and did all the legal aid work in my firm.

As a Judge I have sought to make available the best representation possible for the economically disadvantaged. At the beginning of my tenure as Judge, the Circuit Court had one Public Defender appointed. Today there are two. These men were experienced criminal lawyers. In advocating a professional wage from the County Council, the County fiscal body, I have emphasized the need for a salary that will attract the best attorneys possible to act as Public Defenders. It has always been my concern that if I am considering depriving an individual of his liberty, I want to be convinced that the individual was properly represented.

AFFIDAVIT

I, LARRY J. McKINNEY, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Larry

LARRY J. McKINNEY

May 6, 1987

Beverly L. Hart

BEVERLEY L. HART, CLERK,
JOHNSON CIRCUIT COURT

My Term Expires:
December 31, 1987

SUPPLEMENTARY RESPONSES TO

QUESTIONNAIRE FOR JUDICIAL NOMINEES

LARRY J. McKINNEY

I. BIOGRAPHICAL INFORMATION (PUBLIC)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

11. No lapses of membership of which I am aware.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are available to you, please supply them.

12. None.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged". Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   1. My answer to Question 2 of the previous Questionnaire is as specific as I can recall.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

   2. I do not now nor have I ever belonged to any organization which discriminates in membership policies. I have belonged to the Lion's Club and am unaware of any discriminatory policy.

3. (Judicial Nominees Only) Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal court? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

   3. There is a selection commission in Indiana that recommends candidates for nomination to the Federal Bench. The nine member Commission screens applications, interviews applicants, and recommends applicants to the Senators. The Commission was chaired by former Lieutenant Governor Richard Ristine and was made up of the Chief Justice of the Indiana Supreme Court, the president of the State Bar Association, a State Circuit Court Judge, a banker, a school Superintendent, and others from over the State.

      My application was among some 35 to 40 applications for one opening. Applications were to be reviewed, and ten applicants were to be interviewed. After the list of ten interviewee's was published another opening was announced. The Commission decided to alter their usual policy and instead of naming three individuals for one position they named five for two vacancies. After interview with the Commission I was one of the five submitted to the Senators for their consideration. All five were then interviewed by the Justice Department. I was notified by the office of

III. GENERAL (PUBLIC), CONTINUED

Senator Lugar and the office of Senator Quayle that my name would be sent to the White House for the President's consideration to fill one of the two openings. The President notified me that my name would be placed in nomination before the Senate.

I was interviewed and investigated by the F.B.I. after investigatory forms were submitted. I was interviewed by Joan Hall of the ABA after information was submitted to her and after investigation. Although not interviewed, I was investigated by the NAACP. I am currently awaiting confirmation hearing before the Committee of the Judiciary of the United States Senate.

4. (Judicial Nominees Only) Has anyone involved in the process of selcting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue or queston? If so, please explain fully.

4. No one in the process of my selection as a judicial nominee discussed with me any specific case or legal issue or question in a manner that I interpreted as seeking any assurances concerning my position on such case, issue or question.

AFFIDAVIT

I, LARRY J. McKINNEY, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

LARRY J. McKINNEY

DATED: June 9, 1987

Subscribed and sworn to before me this 9th day of June, 1987.

Beverley L. Hart

BEVERLEY L. HART, CLERK,
JOHNSON CIRCUIT COURT

My Term Expires:
December 31, 1987

ABA
AMERICAN BAR ASSOCIATION
Standing Committee on Federal Judiciary
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

CHAIRMAN
and Member-at-Large
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New York, NY 10005

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SECOND CIRCUIT
Harold Tyler, Jr.
30 Rockefeller Plaza
New York, NY 10112

THIRD CIRCUIT
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Philadelphia, PA 19103

FOURTH CIRCUIT
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101 St. Paul's Boulevard
Norfolk, VA 23510

FIFTH CIRCUIT
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SIXTH CIRCUIT
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SEVENTH CIRCUIT
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NINTH CIRCUIT
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Samuel L. Williams
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Los Angeles, CA 90017

TENTH CIRCUIT
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Denver, CO 80203

ELEVENTH CIRCUIT
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May 6, 1987

RECEIVED MAY 08 1987

CONFIDENTIAL

Honorable Joseph R. Biden, Jr.
Chairman, United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Re: LARRY J. McKINNEY
United States District Court
Southern District of Indiana

Dear Senator Biden:

Thank you for affording this Committee an opportunity to express an opinion pertaining to the nomination of Larry J. McKinney for appointment as Judge of the United States District Court for the Southern District of Indiana.

Our Committee is unanimously of the opinion that Judge McKinney is "Well Qualified" for this appointment.

Sincerely,

Robert B. Fiske

ROBERT B. FISKE, JR.
Chairman

cc: All Committee Members and
Certain Former Chairpersons